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In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 393

HAROLD AND DOROTHE MATZNER,
PETITIONERS,

v.

THE STATE OF NEW JERSEY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

	Page
Citations To Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Regulations Involved	2
Statement of the Case	15
Statement of Facts	17
Reasons For Granting the Writ	27
I. New Jersey Violated Procedural Due Process In Several Particulars In Its Effort To Remove Defense Counsel	27
II. The Court Below Had No Valid Ground For Removal Of Petitioners' Counsel	31
III. The Remedy Selected By The Court Below Is Not Rationally Connected To The Relief It Purports To Seek	36
Conclusion	41
Appendix:	
Opinion and Order of May 8, 1968 by the Honorable Robert Shaw, U.S.D.J.	1a
Opinion of the Supreme Court of New Jersey A-161 September Term, 1967 Decided May 29, 1968	9a

Table of Citations

Cases

Bridges v. *California*, 314 U.S. 252	38
Cooper v. *Hutchinson*, 184 F.2d 119	27, 29, 30
Craig v. *Harney*, 331 U.S. 367	38
Giles v. *Maryland*, 386 U.S. 66	34
In Re Oliver, 333 U.S. 259	33
In Re Ruffalo, — U.S. —, 88 S.Ct. 1222	28
In Re Sawyer, 360 U.S. 622	37

Page

Miller v. *Pate*, 386 U.S. 1 34
Napue v. *Illinois*, 360 U.S. 264 34
Near v. *Minnesota*, 283 U.S. 697 38
Pennekamp v. *Florida*, 328 U.S. 331 38
Sacher v. *U. S.*, 343 U.S. 1 37
Sheppard v. *Maxwell*, 384 U.S. 333 ..... 31, 32, 33
State v. *Arnwine*, 67 N.J. Super. 483 39
State v. *Driver*, 38 N.J. 255 39
State v. *Van Duyne*, 43 N.J. 369 ..... 32, 37
Theard v. *U. S.*, 354 U.S. 278 28

STATUTES

United States Constitution
Amendments 1, VI, XIV, Section I 2

MISCELLANEOUS

Rules of the Supreme Court of New Jersey
Chapter VI, Rule 1:16 - 1:18A 3

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No.

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THE STATE OF NEW JERSEY,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Harold and Dorothe Matzner pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in the above-entitled case on May 29, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is unreported at this writing, and is reproduced in our appendix, *infra.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did New Jersey Violate Procedural Due Process In Several Particulars In Its Effort To Remove Defense Counsel?
2. Did The Court Below Have Valid Ground For Removal Of Petitioner's Counsel?
3. Was The Remedy Selected By The Court Below Rationally Connected To The Relief It Purports To Seek?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULES OF THE SUPREME COURT OF NEW JERSEY

Chapter VI. Disciplinary Proceedings

Rule 1:16. Ethics Committees

Note: Caption of Rule 1:16 amended July 15, 1960 to be effective September 7, 1960.

1:16-1. Appointment; Organization

(a) The court shall appoint an ethics committee in each county, consisting of at least 4 counsellors, resident or practicing in said county. The court shall designate the chairman of the committee to serve for a period of one year, and to the extent possible shall rotate the office of chairman among members of the committee. The terms of members shall be staggered, the term of one or more to expire each year. Any vacancy occurring during a term shall be filled by an appointment for the unexpired portion thereof.

(b) Each committee shall organize annually on or before the second Monday in January, and shall meet regularly in each month thereafter, except during July and August, if there are any matters pending which require attention. Each committee shall appoint a secretary, who

need not be a member of the committee, but who shall be a member of the bar.

(c) A majority of the full membership of the committee shall constitute a quorum. A determination shall be made by a majority of the membership sitting. When, by reason of absence, disability, or disqualification, the number of members able to act is less than a majority, the chairman shall apply to the court for the appointment of a temporary member or members. Where a quorum of the committee consists of more than 3, the chairman of the committee may assign an ethics matter to a panel of 3 which panel shall act as the committee for the disposition of the matter and report to the court.

NOTE: Effective September 9, 1953; paragraph (a) amended July 15, 1960 to be effective September 7, 1960; paragraph (c) amended December 6, 1962 to be effective January 2, 1963. Formerly Rules 1:9-1(a) and (b); 1:9-2(a) amended November 10, 1949; 1:9-3 amended November 10, 1949; 1:9-4(h) amended November 10, 1949, December 7, 1950.

1:16-2. JURISDICTION

(a) Each committee shall have jurisdiction over, and shall inquire into and consider, any complaint made against any attorney practicing within its county, involving his character, integrity, professional standing or conduct as a member of the bar. In case of any conflict over jurisdiction, the court, after informal presentation of the matter on motion, shall resolve the conflict and refer the complaint to the proper committee.

(b) A committee may, on its own motion and without formal complaint being made to it, investigate any condition or situation in the county coming to its attention and involving the character, integrity, professional standing or conduct of any attorney practicing in the county. If the committee finds evidence of unprofessional or un-

ethical conduct it shall have prepared a statement of charges which shall be regarded as a complaint and proceedings shall be thereafter had as under Rule 1:16-4.

(c) Where necessary, a committee may apply to the court for an order directing the county prosecutor to aid in any such investigation.

(d) A committee shall not render advisory opinions.

NOTE: Amended November 10, 1949. Formerly Rule 1:9-2.

1:16-3. SECRETARY; CONFIDENTIAL RECORDS; REPORTS

(a) The secretary shall keep complete minutes of all meetings and proceedings of the committee. He shall be responsible for the preservation of all its records and files, and shall surrender them complete and intact, to his successor in office.

(b) All records, files, meetings and proceedings in all disciplinary matters shall be regarded as confidential and shall not be disclosed to or attended by anyone except as authorized by these rules or by this court.

(c) The secretary shall submit a report on the first day of each month to the Administrative Director of the Courts, for the information of the court, showing the status of all matters pending before the committee. He shall also report on any investigation initiated by the committee, the status thereof, and the committee's findings.

NOTE: Effective September 9, 1953; paragraph (b) amended December 9, 1963 to be effective January 2, 1964. Paragraphs (a) and (b) formerly Rule 1:9-1(c), amended November 10, 1949; paragraph (c) formerly Rule 1:9-3, amended November 10, 1949.

1:16-4. FORM OF COMPLAINTS; PROCEDURE

The following procedure shall govern the handling of complaints:

(a) Every complaint shall be in writing, signed and sworn to, and filed with the secretary of the committee in triplicate. It shall state the names and addresses of the complainant and the attorney complained against, the facts constituting the alleged improper conduct on the part of the attorney, and whether the same or a similar complaint has ever been made to and considered by any ethics committee. The secretary shall, where necessary, assist the complainant in preparing the complaint.

(b) Immediately upon receipt of a complaint, the secretary shall make written acknowledgment thereof to the complainant. He shall forthwith serve a copy on the attorney named therein, either personally or by regular mail, and mail a copy to the Administrative Director of the Courts. The Secretary shall open a separate file for each complaint and properly index it.

(c) The attorney shall, within 10 days after the mailing of the complaint to him, file a written answer thereto, in triplicate, with the secretary of the committee. The secretary shall mail one copy to the complainant and one copy to the Administrative Director of the Courts. He shall also, upon receipt of the answer, or at the expiration of the 10-day period if there be no answer, refer the complaint to one or more members of the committee designated by the chairman for preliminary investigation. Such investigation shall be promptly instituted and completed. The committee member or members shall interview the complainant and the attorney involved, and shall conduct the investigation in such other manner as may be deemed proper. Upon its conclusion, a written report of the investigation and of the findings shall be made to the entire committee, and a copy thereof forwarded forthwith to the Administrative Director of

the Courts. If the attorney shall fail to file an answer as herein prescribed or shall fail to appear at the time fixed for hearing, the committee shall notify the court of such fact by letter. Upon receipt of said letter the court may, if the circumstances warrant, immediately issue an order directing the attorney to show cause why he should not be suspended pending disposition of the complaint.

(d) The committee shall consider the investigation report at the first regular meeting following its filing. If, after consideration, the committee finds that there has been no unethical or unprofessional conduct, and votes to dismiss the complaint, it shall submit a full report of facts and of its conclusions to the court through the Administrative Director of the Courts. The secretary shall at the same time notify the complainant and the attorney involved of the dismissal and the reasons therefor, in writing, and mark the file "Closed".

(e) If the committee, after considering the report of the preliminary investigation, determines that there are indications of unethical or unprofessional conduct meriting further investigation, the complaint shall be set down promptly for formal hearing. The secretary shall give at least 10 days' written notice to the attorney involved, and to the complainant, by regular mail, stating:

(1) The time and place of formal hearing.

(2) That he may be represented by counsel, if he desires.

(3) That subpoenas will be furnished to him if he will send the names and addresses of his proposed witnesses to the secretary.

(4) That he may produce witnesses and such

proof before the committee as may be relevant to the issue.

(f) If the complainant is not represented by counsel, the committee shall designate a counsellor to prepare and prosecute the case before it. If the person so designated be a member of the committee, he shall not thereafter take part in the discussion of, nor vote upon, that particular case.

(g) The hearing shall be conducted in private and in a formal manner. A complete stenographic record shall be kept, and to this end an official court stenographer of the county, assigned by the supervising court reporter for that purpose, shall serve the committee and prepare all necessary transcripts without additional compensation. Such transcripts may be ordered only by the chairman in the event a presentment is voted by the committee or, in the discretion of the chairman, when unusual circumstances warrant; provided, however, that the transcripts may be made available solely to members of the committee. The transcripts of a hearing shall not be made available to any member of the committee who has disqualified himself from participating in such hearing. The chairman, or in his absence or disability another member chosen by the committee shall preside over and conduct the proceedings. Any member of the committee is hereby authorized to administer oaths to all such witnesses as may appear or be brought before the committee. The complainant and the attorney complained against shall have the right to be present at all times during the hearing, with their respective attorneys, if any. They shall also have the right to examine and cross-examine witnesses, but examination and cross-examination by the complainant shall be conducted principally by his attorney or the prose-

cutor designated by the committee. The committee shall not be bound by strict rules of evidence.

(h) The committee shall consider the case promptly at the conclusion of the formal hearing and reach a determination. If it decides that there has been no unethical or unprofessional conduct, it shall dismiss the complaint, and the secretary shall at once notify the interested parties of the dismissal and the reasons therefor, in writing, and mark the file "Closed". The committee shall also submit a full report of the facts and of its conclusion to the court through the Administrative Director of the Courts. If the committee decides that there has been unethical or unprofessional conduct, the secretary shall promptly prepare an original and 9 copies of a presentment, to be signed by the members of the committee concurring therein. The presentment shall consist of a summary of the case containing the committee's findings of fact. The committee shall likewise cause to be prepared an original and 9 copies of the transcript of the testimony. The original and 7 copies each of the presentment and transcript, together with all exhibits, shall be filed with the court, one copy each of the presentment and transcript shall be served upon the respondent, and one copy of each shall be retained by the committee.

(i) The court shall consider the presentment and determine whether to issue an order to show cause why the respondent should not be disbarred or otherwise disciplined. If no order to show cause is to be issued, the clerk of the court shall so notify the committe and the respondent. If an order to show cause is issued, the same shall be served upon the respondent. The order shall fix a date for hearing before the court, which hearing shall be on the record before the

committee. The attorney designated by the committee to prosecute the matter shall prepare a brief in support of the presentment and file 8 copies thereof with the court and serve a copy thereof on the respondent within 2 weeks of the date of the order to show cause. Within 2 weeks of the date of service of the committee's brief, the respondent shall file with the court 8 copies of his answering brief and serve a copy thereof on the attorney for the committee. Briefs may be typewritten.

Note: Effective September 9, 1953; paragraph (a) amended July 15, 1960 to be effective September 7, 1960; paragraphs (c) and (h) amended December 6, 1962 to be effective January 2, 1963; paragraph (i) adopted July 27, 1961 to be effective September 11, 1961; amended December 6, 1962 to be effective January 2, 1963. Formerly Rule 1:9-4, amended November 10, 1949; December 7, 1950.

1:16-5. Subpoena for Witnesses

(a) The chairman of an ethics committee, the secretary or any member thereof, upon determining that certain persons may have any information or knowledge or be in the possession of any books, papers, documents or other tangible things material to any investigation or hearing authorized by these rules, may issue subpoena in the name of the Clerk of the Superior Court requiring such person or persons to appear and testify before or be examined by the committee, or any member thereof, at the time and place named in the subpoena, and from day to day thereafter until the testimony or examination of such person or persons shall be completed.

(b) The subpoena may also contain a direction that such person bring with him to the examination, any books, papers, documents, or tangible things designated therein.

Note: Effective September 9, 1953; amended July 15, 1960 to be effective September 7, 1960. Formerly Rule 1:9-6, amended November 10, 1949; December 7, 1950.

1:16-6. SERVICE OF SUBPOENA

The process of subpoena authorized by Rule 1:16-5 shall be served in the same manner and be of the same force and effect as like process in civil actions in the Superior Court.

Note: Adopted November 10, 1949. Formerly Rule 1:9-7.

1:16-7. DISOBEDIENCE TO SUBPOENA

(a) In case any person so summoned by subpoena shall refuse to obey the subpoena, or any direction therein, or to give testimony, or to answer questions as required, or to produce any books, papers, documents or tangible things as required, the chairman of the committee may apply to the Superior Court on motion supported by affidavits for an order to show cause or an order of arrest against such person for a contempt.

(b) The court shall hear the application, and if satisfactory proof be made of such refusal, may issue an order, directed to the sheriff or any constable of the county, for the arrest of such person, or may issue an order against such person directing him to show cause why he should not be held in contempt.

(c) If upon hearing, the court determines that the failure or refusal of the person was without justification, the court may punish him as for a contempt of court, and may compel him to pay the costs of the contempt proceeding to be taxed by the court.

Note: Adopted November 10, 1949. Formerly Rule 1:9-8.

Rule 1:17. Review

1:17-1. Petition for Review

Any complainant aggrieved by the determination of a committee may petition the court for relief, and the court shall make such reference or other disposition as it deems proper in the circumstances.

Note: Amended November 10, 1949. Formerly Rule 1:9-4(i).

1:17-2. Order for Review

When ordered by the Court, the Board of Bar Examiners shall review any proceeding heard by an ethics committee, and shall submit a report of its findings to the Court. Such review may be made on the record before the ethics committee, when so ordered by the Court, but in other causes shall be heard de novo. The Chairman of the Board shall have the same power to issue subpoenas as provided in Rule 1:16-5 and they shall be enforced as provided in Rule 1:16-7.

Note: Effective September 9, 1953; amended July 15, 1960 to be effective September 7, 1960. Formerly Rule 1:8-1(e) and (f).

Rule 1-18. Discipline and Disbarment

1:18-1. Filing of Papers

Presentments made to the court for the purpose of obtaining an order to show cause why an attorney should not be disbarred or why he should not be otherwise disciplined shall not be filed without an order of the court; and no such order to show cause, if allowed, shall be actually entered until the court by special order so directs; and whenever such an order, not entered, shall be discharged, no entry thereof shall be made and no papers shall be filed.

Note: Amended November 10, 1949. Formerly Rule 1:9-5(a).

1:18-2. Suspension and Disbarment

(a) No person who shall be disbarred or suspended as an attorney at law shall, during the period of such disability, practice as a counsellor at law.

(b) No attorney shall employ in his law offices any attorney who was disbarred or supended after January 1, 1953, during the period of such suspension, nor shall any attorney permit or authorize any such disbarred or suspended attorney to perform any services for him in the practice of law, or to occupy, share or use office space with him in the office where he practices law, during the period of such suspension.

(c) No application for reinstatement by a person who has been suspended as an attorney-at-law shall be heard by the court unless 30 days notice thereof shall be given to the chairman of the ethics committee which conducted the said disciplinary proceedings, and to the chairman of the ethics committee of the county in which said person resides at the time of such application. Each of such chairmen shall bring the application to the attention of his committee which shall review the file and make an investigation of the applicant's activities subsequent to his suspension. Each committee shall submit a written report of its findings to the court.

Note: Effective September 9, 1953; paragraph (c) amended July 15, 1960 to be effective September 7, 1960. Paragraphs (a) and (c) formerly Rule 1:9-5(b) and (c), amended November 10, 1949; paragraph (b) formerly Rule 1:7-7(i), adopted January 1, 1953.

Rule 1:18A. Resignation

An attorney against whom a complaint has been filed with an ethics committee may submit to the court through the ethics committee his resignation as a member of the

bar. The court in its discretion may accept the resignation with or without a presentment being filed. If accepted such resignation shall be with prejudice and equivalent to disbarment and the order accepting such resignation shall be published as in case of disbarments.

Note: Adopted August 3, 1965 to be effective immediately.

STATEMENT OF THE CASE

On June 29, 1967, petitioner Harold Matzner was indicted by the grand jury of Passaic County, New Jersey, for the murder of Judith Kavanaugh. On October 11, 1967, Harold Matzner was indicted by the same grand jury for the murder of Gabriel DeFranco. On January 10, 1968, petitioner Dorothe Matzner was indicted for the murder of Judith Kavanaugh.

Counsel undersigned was permitted to file an appearance in all three cases as defense counsel, even though he was and is a member of the Massachusetts Bar. In each murder the prosecution claimed an eyewitness who allegedly saw petitioners commit the murders. Based on such evidence, Harold Matzner was denied bail; Dorothe Matzner was freed on $50,000 bail on the ground that the trial of her indictment would be substantially delayed. Both petitioners claimed from the outset that they knew nothing of the murders, and that the statements against them were wholly false.

After numerous postponements over the objection of petitioners, the Defranco indictment was set for trial on April 22, 1968. On April 10, 1968, Special Prosecutors James Dowd and Richard McGlynn appeared before the trial court and urged a further postponement; the trial judge indicated that such a motion would be denied. There followed a lobby conference, then a private conversation between defense counsel and the prosecutors, an assent by petitioners to a continuance, and a postponement by the trial judge for an indefinite period. On April 22, 1968 the trial was rescheduled for May 20, 1968, without the assent of the petitioners. Events which occurred between April 10, 1968 (at which time petitioner Harold Matzner was admitted to bail) and the resetting of the trial date led to the litigation in question.

As a result of those events, described below, a letter was sent on April 24, 1968, to various state and federal officials, with copies of the letter to numerous other state and federal officials. On April 30 1968, the Supreme Court of New Jersey issued a directive, *sua sponte,* to the trial judge, ordering the removal of counsel unless cause for retention could be shown. On April 30, 1968, the trial judge sent a telegram to defense counsel ordering a forthwith appearance. On May 1, 1968, defense counsel and petitioners did appear and were ordered to sit in chambers with the trial judge during a proceeding wherein the trial judge questioned counsel about the letter described above and the manner of its transmission and dissemination; the trial judge refused to permit inquiry into the truth of the claims of the letter. He further refused a public hearing in open court. He ordered that defense counsel be removed, and issued a statement to the press giving his view of the matter. He impounded the record of the proceeding, and ordered all parties not to disclose its contents.

On May 1, 1968, suit was brought in the United States District Court for the District of New Jersey asking on behalf of the petitioners as plaintiffs that the trial judge (the named respondent) be enjoined from enforcing his order inasmuch as said order denied to the plaintiffs their civil rights. On May 7, 1968, a hearing was held in the District Court before Shaw, J., at which time Judge Shaw determined that the complaint raised matter giving him jurisdiction. He took testimony from Prosecutors Dowd and McGlynn and another, which was offered to prove the truth of the allegations of defense counsel's letter of complaint. Judge Shaw indicated that he was taking the testimony of these witnesses in order that he might more swiftly dispose of the matter should it eventually be his lot to do so. He also stated that should he decide to refer the matter back to the New Jersey Supreme Court before

entering judgment, he would order the testimony sent to that Court for its inspection and possible consideration. The Attorney-General of New Jersey, representing the respondent trial judge, declined to cross-examine the witnesses; at the conclusion of the first day, neither party rested; Judge Shaw indicated that he would file an opinion forthwith. On the following day, May 8, 1968, Judge Shaw did file an opinion retaining jurisdiction and deferring further action on the matter until the petitioners had an opportunity to ask the Supreme Court of New Jersey for review.

Pursuant to that judgment, petitioners on May 8, 1968, filed motions for leave to appeal with the New Jersey Supreme Court; on May 9, 1968, said motion was granted, and oral argument was had on May 20, 1968. On May 29, 1968, that Court rendered the judgment and opinion set forth *infra* 9a-26a, affirming the trial judge's order of removal. It is that judgment which petitioners now seek to have this Court review.

STATEMENT OF FACTS

The record, although sufficient for purposes of this petition, is indeed sparse in areas which we consider to be critical to the questions raised, primarily because New Jersey has consistently denied petitioners' demands for record which was more complete. Our frame of factual reference is therefore circumscribed by a series of proceedings, each in and of itself inadequate, which includes.

(1) An *ex parte* investigative proceeding in the New Jersey Supreme Court from which there issued a *sua sponte* order to the New Jersey Superior Court directing the removal of counsel; and,

(2) A limited *in camera* conference in the New Jersey

Superior Court which lacked pleadings, hearings and advocacy; followed by,

(3) A partial hearing in the United States District Court, at which some evidence was taken without cross-examination and which was interrupted in midstream; and,

(4) A quasi-appellate proceeding in the New Jersey Supreme Court at which petitioners' counsel was continually interrogated in evidentiary fashion.

Formal records were kept at the second and third proceedings; to petitioners' knowledge, none are available as to the first and fourth.

From those records which New Jersey and the United States District Court did keep, the following facts are offered.

Both petitioners are under indictment for murder in the first degree; the petitioner Harold Matzner is under indictment for two capital murders. After many postponements and delays, all of which were complained of as violative of petitioners' respective rights to a speedy trial, a firm date of April 22, 1968, had been set. Special Prosecutor James Dowd and his Associate, Richard McGlynn, Esq., appeared in the Superior Court on April 10, 1968, and urgently sought a continuance. These petitioners objected, and Trial Judge Brown indicated his clear intention to rule in their favor.

There then occurred a lobby conference, unrecorded. That conference was interrupted for the purpose of permitting a private conference between Messrs. Dowd and McGlynn and counsel undersigned. In the course of that conference, Mr. Dowd indicated that he did not believe that petitioners (or any of their codefendants) were guilty of either of the murders; that he had reason to believe that one Edward Lenney, primary witness in the forthcoming trial (without whom there is concededly no *prima facie* case against any defendant including petitioner Harold

Matzner) was lying about his supposed observations at the time Gabriel Defranco's throat was cut, and that he (Mr. Dowd) felt some ethical discomfort about placing Lenney on the stand under the circumstances. Mr. Dowd represented that if he were given some additional time to investigate the matter further (he had entered the case with Mr. McGlynn in February, 1968) he would be in a position to demonstrate that Edward Lenney was a liar, and determine who had helped him to manufacture his testimony. Mr. Dowd asserted that should this occur he would move in open court to dismiss the indictment against Harold Matzner, thus restoring to him his reputation much more effiectively than a jury acquittal could ever do. Mr. Dowd opined that the Defranco killing was obviously a gangland type, and would probably never be solved; that there was very little chance of conviction he knew, but it would be better not to run the risk; and that the record as compiled before his entry into the case disclosed so much prejudicial error that it was doubtful if any conviction would stand up on appeal.

He further stated that although the defendants indicted for the Kavanaugh murder were not, from what he had seen of the file, those who had committed the murder, it it did not appear to be of gangland origin and might be solved; especially with a quiet but cooperative effort between his office and all defense counsel.

Mr. Dowd was asked the source of his authority to take the action he proposed if the defense were to assent to a postponement. He stated that he was in fact not a Special County Prosecutor, but a Special Assistant Attorney-General who had been appointed at the suggestion of United States Attorney-General Ramsay Clark, and that he had full authority to dispose of the case as truth and justice might require. He stated that if the defendants were to

cooperate in his effort to reach the truth, he would withdraw the state's opposition to their release on bond.

Throughout this conference Mr. Dowd displayed an attitude of honesty, competence and sincerity, and asserted without equivocation that his authority was plenary. To all of what Mr. Dowd said Mr. McGlynn agreed.

Thereafter counsel conferred with petitioners, who agreed to cooperate and abide by Mr. Dowd's suggestions — not without some reservations, but in reliance on the advice of counsel. After a further lobby conference and a subsequent proceeding in court (but not in open court) the Defranco trial was postponed indefinitely and the defendants were all admitted to bail.

Mr. Dowd, pursuant to his promises, interrogated Edward Lenney at some length and on April 17, 1968, obtained from him an admission that his story about witnessing the Defranco murder was wholly false; that he had been in Baltimore on the day in question, as the defense contended; and that he had never met petitioner Harold Matzner in his life. Mr. Dowd informed defense counsel of this event on the evening of April 17th, and went with defense counsel to the home of Passaic County Court Judge Theodore Rosenberg to request a hearing where Lenney's statement might be recorded as a predicate for a motion to dismiss the indictment. The matter was deferred until Trial Judge Brown might be available, and on the following day Mr. Dowd with a stenographer took Lenney's retraction under oath. As of the date of this writing there is no evidence that Lenney has ever reverted to his accusatory position in the case.

At some time very soon thereafter, Mr. Dowd was in some manner relieved of his authority to move for dismissal. Reports began to circulate that the County Prosecutor was preparing to indict Mr. Dowd and defense counsel for some unspecified acts of coercion with regard to

Lenney. Assignment Judge Crane of the Superior Court returned from abroad and without hearing reset the trial for May 20, 1968.

On April 23, 1968, pursuant to a prior arrangement, defense counsel went to see Assignment Judge Crane in his chambers. Audience was refused. Later that same day, in Boston, defense counsel undersigned wrote the letter set forth in the opinion of the New Jersey Supreme Court and, after giving instructions as to its distribution, left for New Orleans.

On May 3, 1968, pursuant to the developments outlined in our Statement of the Case, *supra*, a proceeding was had in the lobby of Trial Judge Brown. Present were the petitioners, Associate Counsel from New Jersey, and Judge Brown with his official reporter. Other New Jersey defense co-counsel were denied attendance. A hearing in open court was denied. (R.A. 10a) A motion that Judge Brown inquire into the truth of the allegations of the letter in controversy, and consider that truth in disposing of the question before him, was likewise denied. (R.A. 9a, 10a, 40a) Judge Brown then read for the first time the directive of the New Jersey Supreme Court ordering the removal of counsel to petitioners; (R.A. 8a) it had already been printed verbatim on the front page of a local newspaper having been released, presumptively, by the New Jersey Supreme Court. (R.A. 11a)

Because the directive in question had placed the burden of proof—to an unspecified standard—on petitioners, counsel indicated his authorship of the letter (R.A. 12a) and submitted the affidavit of a secretary reporting the distribution she had made. Judge Brown then asked what he termed the "sixty-four dollar question": Whether counsel had released the letter to any newsman. (R.A. 19a) The response was clear and negative. He declined to inquire further into just who *had* released it, stating that his own *ex parte* queries had been answered with "a

smile." (R.A. 20a) He then announced that by reason of reckless distribution of unauthorized material, counsel was removed. (R.A. 42a) He thereafter issued a press release drawn up by him as to what had occurred in the secret session, which was duly published.

Suit was immediately filed in the United States District Court in Newark setting forth many of the above facts, and hearing was had on May 7, 1968 before District Judge Shaw. After some argument by counsel on the question of jurisdiction, Judge Shaw indicated his finding that jurisdiction had been established. (R.A. 94a) He further indicated a tentative opinion that he should defer action on the matter until petitioners had had a chance to appeal Judge Brown's order to the New Jersey Supreme Court, thus rejecting petitioners' contention that that Court had already acted on the matter. (R.A. 101a)

In an unusual step however, and pursuant to his obvious view that the truth of counsel's claims was not irrelevant to the conduct to be judged, he elected to take evidence offered by petitioners in support of their complaint. (R.A. 102a) At the end of the day the hearing was shelved, and the evidence impounded. Judge Shaw ordered that the evidence taken be "made available" to the New Jersey Supreme Court for its perusal and possible use. (R.A. 153a)

He had suggested in one colloquy that the writing of such a letter might have been unnecessary, (R.A. 58a) and that a proceeding before the court might have forced dismissal of the indictment; he made it very plain that in *his* court, such would be the case. (R.A. 59a) He was informed by New Jersey defense co-counsel present that no such proceeding was known to New Jersey Law in their opinion, and that they had so informed their colleague from Massachusetts. (R.A. 67a) The Assistant Attorney-General acting for respondent insisted that this was not so; (R.A. 70a)

however, the New Jersey Courts have since clearly demonstrated that defense counsel were correct.[1]

The New Jersey Supreme Court granted leave to appeal and heard oral argument on Monday, May 20, 1968. (The trial date had in the meantime been continued to June 3, 1968) Unfortunately, there is no official record of what was said during that proceeding by any counsel or members of the Court, since it consisted in large part of an interrogative procedure which resulted in selective findings of fact embracing some of the answers which counsel gave. The issue of the truth of the allegations of perjury and fraud was foreclosed, and the Supreme Court ruled that it would not consider the evidence adduced in federal court. In its opinion, however, it made reference to that evidence and claimed that it did not support petitioners' contentions. For this reason that testimony is summarized below:

JAMES T. DOWD, CALLED AND SWORN AS A WITNESS, WAS EXAMINED AND TESTIFIED IN SUBSTANCE AS FOLLOWS:

He was contacted by the office of the Attorney General of the State of New Jersey and was requested, upon the recommendation of the Attorney General of the United States, to become special assistant prosecutor of the criminal cases pending against petitioners. He was told that he would be in charge of the cases "in every aspect." (R.A. 107a) Having accepted the position, he appeared, on April 10, 1968, before Judge Brown of the Passaic County Superior Court to request a continuance of the trial of the DeFranco indictment. (R.A. 108a). It having become apparent that Judge Brown was inclined to deny this request for

[1] Immediately following the statement of the Assistant Attorney General in Federal Court, the defense filed motions in Superior Court to dismiss the indictments on the ground that false testimony was to be used. The motions were denied.

continuance, a private and off-the-record conference was held in Judge Brown's courtroom between him, Attorney Richard McGlynn, whom he had appointed as co-counsel, and petitioners' counsel (R.A. 108a). Petitioners' counsel stated his belief that the indictment was based upon perjured testimony and inquired as to Dowd's specific position in the case. Mr. Dowd replied that he was in charge of it in every aspect (R.A. 109a). He agreed, upon counsel's request, to investigate these allegations of perjury during the time that would become available if the requested continuance was granted. Accordingly, an agreement was reached between Dowd and petitioners' counsel wherein counsel would agree to the continuance in return for Dowd's promise that should he discover improper evidence, he would not be a party to its use and would "take it before the appropriate judge for the appropriate disposition" (R.A. 111a). Again, when questioned as to his authority to enter into such an argeement, he responded that his "authority was complete in every respect as to this case." As a result of his subsequent more intensive investigation into the case, he discovered "inconsistencies in the evidence" (R.A. 110a). Witness Edward Lenney made an oral recantation to Dowd completely contradicting his prior statement, which had accused Harold Matzner of murder (R.A. 112a). Lenney also expressed grave fears of bodily injury because he had made the recantation (R.A. 113a). Mr. Dowd, alarmed both over the extraordinary evidence he had discovered and the fears that Lenney had expressed, invited defense counsels, Mr. Garth and Mr. Afflitto, to immediately seek an audience with Judge Theodore Rosenberg. A late night visit was made to the Judge's residence. It was decided there that evidence as to the recantation would be taken in open Court the next morning. If there was to be a motion to dismiss, it was to be passed on by the assignment judge (R.A. 113a).

The next morning Mr. Dowd went to the courthouse several times, but Judge Rosenberg was unavailable. He returned to his office and at this time obtained a written statement under oath from the witness Lenney. Mr. Dowd then discussed the matter with Mr. Thevos, and it was decided to wait until Monday to consider the matter (R.A. 123a). Mr. Dowd testified, that though he had informed counsel that he had complete charge of the case, in every aspect, at the time the continuance was arranged, he now understood that he did not have the authority to dismiss the cases if he was satisfied that Edward Lenney was a perjurer. He stated that he now understood that he was "subservient" to Mr. Thevos, as he was the county prosecutor, and that any such action had to be cleared through Mr. Thevos (R.A. 124a).

RICHARD B. MCGLYNN, CALLED AND SWORN AS A WITNESS, WAS EXAMINED AND TESTIFIED, IN SUBSTANCE AS FOLLOWS:

He is an attorney licensed to practice law in the State of New Jersey and since April 1, 1968 has been acting as co-counsel with James T. Dowd as a special prosecutor in State v. Matzner, et al. He was so selected by Mr. Dowd and entered the case as co-counsel at his request. On April 10, 1968 he and Mr. Dowd brought a motion before the Court for an adjournment, the apparent response to which, by the court, was negative. (R.A. 129a) At the request of petitioners counsel, an off-the-record conference took place in which petitioners counsel suggested that the testimony of Chief Prosecution witness Lenney was perjured. (R.A. 129a) Mr. Dowd requested time in order to investigate this suggestion and stated that an exchange of information was desirable in an attempt to reach the truth. This exchange would include results of investigation accumulated by petitioners to the effect that witness Lenney was in Baltimore

on the night of the DeFranco slaying. Petitioners counsel offered to produce his clients to the state for polygraph testing by a panel of experts recommended by the prosecution. Mr. Dowd stated, in response to inquiry by petitioners counsel as to his authority to dismiss the indictment, should he satisfy himself that Lenney's testimony was perjured, that he was in complete charge of the case. As a result of this conference the case was continued by agreement. (R.A. 130a)

It was also stipulated that those defendants who had not theretofore been admitted to bail were to now be released on bail, subject to the approval of the Court, which was given. (R.A. 131a)

He was present when the recantation of witness Lenney was reduced to writing confirming said witness's presence in Baltimore, that his story was a concoction, that he didn't know petitioner Harold Matzner and he had induced his brother to lie. (R.A. 132a) He had no reason for believing that Lenney's recantation was untrue, nor had he seen or been confronted with any written statement by Lenney denying that recantation. (R.A. 133a) He unequivocally stated that in his present state of mind he would not feel that he was fulfilling his obligation as a prosecutor were he to put witness Lenney on the stand. (R.A. 135a)

REASONS FOR GRANTING THE WRIT

I. New Jersey Violated Procedural Due Process In Several Particulars In Its Effort To Remove Defense Counsel.

Although there is no clearly defined procedure in New Jersey for taking a defense counsel out of a criminal case (except for abortive efforts as those described in *Cooper* v. *Hutchinson,* 184 F.2d 119), it is plain from a mere perusal of the opinion of the Court below that the basis for removal is misconduct on the part of counsel with no liability whatsoever for such misconduct being assigned to petitioners herein. New Jersey has provided an elaborate procedure for complaint, hearing, and review of any effort to remove counsel from practice. See pages 3-14, *infra.*

The trial court ruled that counsel admitted *pro hac vice* who has spent time in preparation and handling of a criminal case, is to be regarded as a New Jersey lawyer and regulated as such; he, by virtue of his admission *pro hac vice* stands in the shoes of a lawyer admitted to practice in New Jersey. (R.A. 17a)

This being the case, New Jersey was bound to respect its own rules if it chose to pursue the removal of counsel as a desirable objective. In utter disregard of those rules, the New Jersey Supreme Court issued *sua sponte* and *ex parte* with no complaint before it a peremptory order to the trial judge directing him to place on counsel and his clients (petitioners herein), an unspecified burden of showing why counsel ought not to be deleted from the case. This directive, and the informal communiques from the trial judge which it stimulated, in no way comport with what New Jersey, through this same court, has decreed as its procedure for the orderly determination of so grave a

matter as the emasculation of a lawyer. *Theard* v. *United States*, 354 U.S. 278; *In Re Ruffalo*, ____ U.S. ____, 88 S.Ct. 1222 at 1227.

It is apparent from the record of the summary proceeding which occurred, that New Jersey's concern for procedural due process was overwhelmed by its desire for haste and secrecy. The trial judge, acting upon a letter which he obviously regarded as a valid order and judgment of his governing court, held in chambers and over objection, a secret proceeding in which he interrogated counsel at his pleasure and without regard for any established procedure which a citizen or lawyer might contemplate, but, employed one tailored to a situation that he viewed as creating some special need. The very evil about which petitioners most vigorously complained was thus extended through the principal of secrecy: they said that they were being framed and frauded by public officials. They would have been advantaged by public scrutiny of so alarming a spectacle (and in view of New Jersey's refusal to confront the truth of their claims, these claims should, for purposes of this petition, be taken as true) and yet the scrutiny was denied. Although the trial judge chose to leave unilluminated his ground of denial, according him the benefit of every wisdom leaves only the possibility that he may have thought he was protecting the State of New Jersey from the evils of pre-trial publicity.

Although the entire record of Judge Brown's unique chamber proceeding must be reviewed in order that its full import be appreciated, his opening statement makes very clear his callous disregard for the constitutional rights of these petitioners to be fairly and vigorously represented in the pursuit of their vindication:

> The Federal Constitution has no place in our discussion. You have no constitutional right to appear

> in this case. You are in New Jersey as a matter of grace or privilege. You can insist upon nothing, you can demand nothing. You can only plead for courtesy of a discretionary grant of authority.
> . . . Now, the question is are you in good standing here. That's for me to decide. No one else in the world has any part to play in the issue. So, there is no reason to go into a courtroom. (R.A. 10a)

Thus Judge Brown clearly enunciated at the outset his utter disregard for the right of petitioners to a "courtroom" and his asserted will and intent to execute discretion which he did not believe to be reviewed by "anyone else in the world." This was a frightening spectacle indeed for those who were weaned upon the noble guarantees of our Bill of Rights.

Judge Brown, of course, later palliated his decision as to counsel's operating at his pleasure but only in slight degree. (R.A. 18a)

Transcending, if we may, the defects in New Jersey's frantic removal of counsel in this case and its disregard of its own rules for such removal of its own lawyers, we respectfully suggest to this Court the importance of confronting the larger issue. It was alluded to in *Cooper* v. *Hutchinson*, 184 F.2d 119, 121-122, somewhat parenthetically, but without adjudication. In view of the acknowledged shortage of criminal lawyers in this country, so often decried by individual members of this Court in their public addresses, the issue needs decision. The history of our United States practice in criminal cases is studded with trials where lawyers from foreign jurisdictions presided as chief counsel. We need not cite the historical and commendable performance of such luminaries as Clarence Darrow, Daniel Webster, Samuel Lebowitz, Edward Bennett Williams, Percy Foreman, Jacob Erhlich, Melvin

Belli, and others, to assert that defenses of this sort are in the highest traditions of the Bar and a part of the pride in our legal heritage. Indeed, there may always be situations in which the most unpressured and unenmeshed counsel will come from without state borders.

With these considerations in mind, and believing as we do that the only superintendence of such circumstances is our federal courts' jurisdiction, what are the powers of these foreign counsel? The court below has sought to advantage and buttress its opinion by lifting from context the "startling" passage of the *Cooper* case, *infra.* A reading of this case *in toto* lends precious little support to the notion that the United States Court of Appeals for the Third Circuit would, had it been forced to rule upon the issue, have decided it against foreign counsel, as New Jersey seeks to surmise.

But no matter what the result in that court might have been, this court should state whether or not defense counsel who accepts professional employment for the guiding and controlling of a matter so grave as the defense of human life, ought to be insulated against provincial and chauvinistic attack from local courts, who desire his removal for one reason or another. We think that New Jersey was estopped to abrogate its own procedure in severing these petitioners from their voice and their courtroom defender.

Is there any protection for a citizen who, being challenged for his life by a state, entrusts that life to someone licensed to practice in a sister state? If so, what is the protection? Was Judge Brown correct when he said that constitutional rights were irrelevant to the matter before him? If not, what does the constitution in this regard guarantee?

II. The Court Below Had No Valid Ground For Removal.

The nub of New Jersey's complaint is that counsel wrote letters to public officials which were distributed in such numbers as to warrant an inescapable conclusion that such letters were "beamed" to the public. We confront this charge on two planes: First, the petitioner and their counsel had every right to inform the public of their plight as defrauded and maliciously damaged citizens victimized by public corruption; and second, no evidence sufficient to carry the burden of proof in any jurisdiction mindful of constitutional principles was available to New Jersey despite its inquisitional procedures.

A. Despite the Sheppard doctrine, the right of free speech remains in every citizen. The admonitions in *Sheppard* v *Maxwell,* 384 U.S. 333 upon which the Court below purports to heavily rely, reasonably and effectively cautioned against the needless pre-judgment of triable issues by the public (prospective jurors) when the dissemination of information was occasioned by members of the Bar, who through intent or reckless indifference by news releases, distributed information beyond the pale of judicial evidentiary control. Canon 20 of *Canons of Ethics* warns that:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administrations of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases, it is better to avoid any ex parte statement.

But the wisdom of the framers of that Canon contemplated those situations where counsel as a citizen might be forced to decry the evils of government before the public eye where those very evils were being held secret. This is just such a case.

Nothing in *State* v. *VanDuyne*, 43 N.J. 369, or *Sheppard* v. *Maxwell, supra*, was ever intended to enable the government to protect its own fraud by enjoining public discussion. Indeed, the Court below, which sought to use counsel's participation in the Sheppard case as some sort of special injunction as to him, no doubt utilized that reference without knowledge of counsel's emphatic support for continuing freedom of the press:

> We do not suggest a wholesale shackling of the press as an appropriate remedy to insure fair trials. There may indeed be situations where the powers which flow from the First Amendment to our constitution are the only means by which corrupt officialdom can be brought to book. And in cases where the unrestrained juggernaut of a well-intended but misguided free press operates to deprive a citizen of his right to a fair trial, the courts have power to correct a tainted judgment. If there is, as scholars and learned judges now with increasing frequency suggest, a great collision between those paramount forces of the First and Fourteenth Amendments, there is at least some saving grace in the fact that the operation of the latter is always second in time, and abuses resulting from the unchained might of a free press may, in criminal cases at least, finally yield to the supervening corrective force of a dispassionate judiciary not forced to act in haste or in deference to measured deadlines. We thus concede that in appropriate instances news media may, and indeed *ought to, cast*

> *their single or collective harsh light upon shady official conduct.* If through misjudgment or premature castigation some injustice befalls a citizen, the courts can in part correct the wrong and the balance of grief may be laid to the price we pay for the division of powers which promotes and maintains our democracy. Brief for Petitioner, *Samuel H. Sheppard* v. *E. L. Maxwell,* Case No. 490, October Term, 1965. (Emphasis added)

If these petitioners were by politicians framed for some selfish and corrupt personal desire that they might accede to greater power, the remedy was public exposure. Some may suggest that the tortuous and uncertain delayed process of appellate review was the only permissible relief. To so assert pays no heed to the considerable wisdom reflected in this Court's adoption by approval of the words of Jeremy Bentham:

> "... suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge, —that judge will be at once indolent and arbitrary: How corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." *In Re Oliver,* 333 U.S. 259, 271.

Since the Sheppard case was handed down by this Court, barely two years ago, many courts have thought it to be an

unlimited grant of power for judicial control of free expression. Those so discerning have no doubt read the dictum, with its cautions, more profoundly than the rather narrow holding which simply ruled that trials and Roman holidays were incompatible.

It is axiomatic that no state may proceed with a trial knowing that its own witnesses will perjure themselves in an effort to condemn the accused. *Napue* v. *Illinois*, 360 U.S. 264; *Giles* v. *Maryland*, 386 U.S. 66; *Miller* v. *Pate*, 386 U.S. 1.

From the record before this Court, and specifically including the testimony of Messrs. Down and McGlynn, the prosecutors, who are now mysteriously "resigned" from this case (a), it is painfully apparent that there is precious little basis for believing that the state has other than a perjury-riddled prosecution to offer. It is equally apparent that New Jersey clings tenaciously to its right to pursue that prosecution and asserts that the only remedy for such circumstances is a jury judgment. No experienced advocate dedicated to the protection of innocent accuseds could honestly endorse the notion that fair procedure permits casting before an American jury evidence known to be fraudulent, be it slick or clumsy, in the hope that the jury will divine the truth that counsel for both sides know to exist. It is most doubtful that New Jersey would have dared to affront its own citizens with such flawed rationale had the full extent of its judgment been relieved of New Jersey's control of the free dissemination of well documented information.

B. There is no evidence before the New Jersey courts which warrants the conclusions reached by them. Having in mind, as we do in articulating this section, the curious means by which this matter descended as a directive from New Jersey's highest court to the trial court, which, fol-

lowing an apparent mandate, removed counsel, the sufficiency of the evidence upon which the pre-ordained result was carried out is very much in issue. We respectfully suggest that New Jersey ran a free-wheeling course of its own selection without regard to the federal constitional pillars which should have delimited the boundaries of its passage.

Judge Brown, we say, evinced a disposition to rule against the retention of counsel. Having decided for himself that the "$64.00 question" (R.A. 19a) was whether or not counsel had given his letter to any newsmen, and having learned that he had not, he nonetheless proceeded to infer against unique guidelines which no experienced lawyer could have contemplated, that such release was intended. In so doing, Judge Brown and the members of the New Jersey Supreme Court chose to ignore in reaching their inferred conclusion, several salient facts: (1) The letter's content was patently libelous and could only be published viously designed to influence public officials rather than the public, since its asserted and factual objective was its outcome, and (3) the misunderstood assertion by the by one believing himself able to prove the truth of the matter contained; and (2) the text of the letter was obthe *prevention* of a trial rather than the influencing of court below that counsel intended intolerable conduct in releasing to the press juicy details of the case *after* jury sequestration, flies directly in the face of an intent to prepublish the letter's contents, and bespeaks no willingness to consider that the threatened revelations would necessarily be a part of an opening statement by any defense lawyer knowing the facts and fearlessly pursuing the truth. The letter obviously assumes, and its author continues to assume, that for all its Star Chamber proceedings New Jersey did not intend to run a private trial, and newsmen would have laid before the public the opening statement of the

defense no matter how vigorous it might have been (and should be).

III. The Remedy Selected by the Court Below is not Rationally Connected to the Relief it Purports to Seek.

We have, in terms that we believe to be appropriate and not unduly harsh, criticized New Jersey for its unwillingness to balance the possible misconduct of letter distribution to large numbers of public officials against attempted murder by New Jersey officials, including New Jersey lawyers, if honest inquiry into now beclouded factual questions had not been averted. The use of the term "attempted murder" is not lightly made; any attorney who is willing to utilize perjury of the kind demonstrated as to Edward Lenney in this case knowing full well that the wheels set in motion may snuff out the life of an accused, is guilty of either attempted murder or a reckless indifference to its occurence. There can be in the honored tradition of advocacy no more base creature than one who would lend his office to the black nadir of such a transaction.

Counsel throughout the land rely upon the rulings of this court in guiding themselves as they balance the considerable demands of the system on their loyalty and vigor against the reasonable limitation of professional enthusiasm for a cause. That guidance is a guarantee by this Court that counsel who act, mindful of its articulated judgments, shall be protected against emasculation within the broad limits of discretion suggested by that articulation.

In its rulings and orders in the action complained of, New Jersey paid no demonstrable heed to the admonition of Mr. Justice Brennan who said, ". . .a lawyer may criticize the law-enforcement agencies of the government, and the prosecution, even to the extent of suggesting wrong

doing on their part, without by that token impugning the judiciary. Simply to charge, for example, the prosecution with the knowing use of perjured testimony in a case, is not to imply in the slightest any complicity by the judge in such actions." *In Re Sawyer*, 360 U.S. 622, 632.

This court has also said in its guarantee that those who vigorously insist, in good faith, upon the condemnation of governmental corruption for the calling of their office as defenders of life and liberty, that "if its aid be needed, [it] will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate . . ." *Sacher* v. *United States*, 343 U.S. 1, 13.

We, after careful consideration, charge in this petition that New Jersey has demonstrated a reckless disregard for constitutional limitations which seek to prevent any governmental power from burying its citizens in the mire of over-reaching or mud of forced secrecy.[2]

New Jersey has demonstrated no connection between the alleged wrong to the desired right to select an uninformed jury and the extent to which that right may be advantaged by the removal of counsel. It relies heavily upon its own *Van Duyne* decision to support its present action, ignoring the fact that in *Van Duyne*, after the consideration of substantial evidence of pre-trial publicity,

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[2] If this assertion seems unduly enthusiastic, this court should consider that on June 21, 1968, the same Judge Brown ordered into custody the petitioner, Harold Matzner, without delineating any procedural basis for due process therefor, for the offense of talking with a newslady about his case, which conversation was overheard and published by another. No charge of criminal contempt was levied nor any jury trial had. Judge Brown simply thrust your petitioner into custody. Without being so ardent about this travesty as to insist that New Jersey had gone beserk, we do suggest that short of the rack and thumb-screw, the infamous Star Chamber, against which our Bill of Rights was erected, could have done little more.

it affirmed its conviction to offer its dictum as guidance for other, presumably more egregious cases. In this case, with no evidence at all before it that a single prospective juror might have been prejudiced by the publication of counsel's letter, it was willing to assume a damage that it was unwilling to litigate. New Jersey gave no brief mention, as it created no law, to the momentous nature of its departure from the very tight restriction upon limitation of free speech imposed by this Court in *Near* v. *Minnesota,* 283 U.S. 697 wherein it was settled that only a "clear and present danger" would warrant the restriction of otherwise valid public expression of ideas. See also *Bridges* v. *California,* 314 U.S. 252; *Pennekamp* v. *Florida,* 328 U.S. 331; *Craig* v. *Harney,* 331 U.S. 367.

New Jersey, in stating that no citizen through his counsel (the Chief Justice of New Jersey in the course of oral argument suggested that had the petitioners themselves written the letter, they could quickly be cast in prison for such conduct; he did not suggest the constitutional procedure by means of which this might be accomplished) may write public officials in small or large number (since the disclosure in this case has never been traced and could, upon the evidence, have come from the governor himself) has in fact imposed liability for any publication however wrought.

Both the trial judge and the court below multiplied displeasure by reference to counsel's suggestion that public officials should consider the fact that all petitioners had been cleared by responsible polygraph tests. The court below sought to strengthen its condemnation of the use of the word "polygraph" by reference to its own decision in *State* v. *Driver.* (R.A. 221a) That decision was not based upon the admissibility of such tests, but only upon the prosecutor's right to allude to petitioners refusal to take such a test. The New Jersey Supreme Court unfortunately

thereby elected to present judgment on an issue which is as yet unripened and unpresented to it. Following the guides of its dictum in *State* v. *Driver*, 38 N.J. 255 and *State* v. *Arnwine*, 67 N.J. Super. 483, all counsel sought to spend their time laying a very substantial foundation for the use of the polygraph as an instrument of truth, generally scientifically accepted by qualified experts and so heavily relied upon by New Jersey police that its selective use is a flat denial of the equal protection laws guaranteed by our Fourteenth Amendment. Since Judge Brown condemned without decision, evidence which he as a jurist heard, and because the New Jersey Supreme Court condemned evidence that had never been heard, we have summarized herein the testimony on that issue which is of record, and have certified to this court the transcript of that testimony in order that a fair judgment be made. At this distance, those charitable enough to say that the unwillingness of the Passaic County Prosecutor to consider the value of polygraph tests of the petitioners was misguided, must also acknowledge that it was more than appropriate to bring this poor judgment to the attention of those other officials in New Jersey who also have something to say about what laws will be. If New Jersey can be authorized to spend money for polygraph instruments and the training of polygraph examiners, than any of its tax paying citizens should have standing to claim the benefits of whatever advantages may result.

The heart of this case need not be buried in verbal niceties. Counsel was obviously confronted with an opportunity to win for his client something far greater than our constitutional guarantees—vindication by a state official who, being charged with the public interest, would have been willing to stand up and say before all the world that petitioners were not the beneficiaries of a reasonable doubt, but were innocent. Having acceded to this promise

and having found that it was without just cause or explanation revoked, and having some sophistication in a system where all informed advocates know that much of what goes on does not receive the benefit of appellate reports, counsel reacted to plain evidence of "the fix" with a strategic effort to reach enough public officials to transcend that fix. Being unsophisticated in the niceties of New Jersey politics, good judgment dictated that the truth be promulgated not to selected officials, but to all officials. That one of those officials saw fit to release the letter of counsel to the press, and that the letter of counsel was determined by the press to be published, was neither foreseeable nor a predictable consequence. It was the only remedy available to fight corruption of the kind that pervades this dishonest prosecution. More important, it will continue to be the only remedy available in the future. If this court condones New Jersey's solution of the constitutional violation of (1) suppression of fact, with (2) illegal peremptory proceeding for the removing of counsel with (3) the continuing over petitioners' objection of the case against them in order to palliate (1) and (2), this troubled country has taken a sad turn in the wrong direction.

CONCLUSION

It is customary in petitions of this sort to respectfully suggest or to encourage the grant of certiorari for the review of special and important questions for reasons much variegated among the many petitions with which this Court is inundated. In this case, and with due and over due respect for the ultimate power in this land, we respectfully exhort this court to halt the erosion of that which keeps in balance our government: the right of a free man to tell his other free men that one given the public trust is corrupt. The Petition for Writ of Certiorari should be granted.

Respectfully submitted
F. Lee Bailey
Counsel for Petitioners

Joseph T. Afflitto
Wayne, New Jersey
Of Counsel

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 434-68

HAROLD MATZNER and DOROTHE MATZNER,
PETITIONERS,

v.

GORDON H. BROWN, Judge, Superior Court,
Passaic County, New Jersey
RESPONDENT.

OPINION and ORDER

This action is brought by petitioners pursuant to the Federal Civil Rights Act. 42 U.S.C. 1983,[1] the provisions of which the district courts of the United States have original jurisdiction to enforce. 28 U.S.C. 1343.[2]

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[1] 42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] 28 U.S.C. 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United

Petitioners were indicted in Passaic County for murder in the first degree and trial of the indictments is scheduled for May 20, 1968. They retained F. Lee Bailey, Esquire, a member of the bar of the State of Massachusetts, to represent them as trial counsel. Leave to represent them was granted by the State trial court during September 1967 pursuant to R.R. 1:12-8. Since that time he has represented them and intends, at their request, if permitted by the court, to represent them at trial.

On April 24, 1968, Mr. Bailey wrote to the Governor of the State of New Jersey expressing his opinion as to the merits of the State's case with criticism of the continued prosecution of it. Copies of this letter were forwarded to the Attorney General of New Jersey, the United States Attorney for the District of New Jersey, the President of the New Jersey Bar Association, the Attorney General of the United States, members of the New Jersey State Legislature, Congressmen and United States Senators from the State of New Jersey, and sixteen members of the American Polygraph Association. The letter reached the hands of the press and statements made therein were published.

By letter dated April 30, 1968, addressed to the respondent by the Clerk of the Supreme Court of New Jersey, respondent was advised as follows:

> The Court, on the basis of a published letter from F. Lee Bailey, Esquire, to Governor Hughes, dated April 24, 1968, directs that you revoke the permission heretofore given to Mr. Bailey to appear as counsel

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States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

in the Kavanaugh and related matters *unless the said Bailey or his client shows cause satisfactory to you to permit him to remain as counsel in said matters.* (Emphasis supplied)

A hearing to that end is to be held by you forthwith. At such hearing, you shall make inquiry as to the extent of the distribution of said letter and counterparts thereof addressed to others. The foregoing is independent of such action as the Supreme Court may itself take with respect to a permanent bar of Mr. Bailey from appearing in the courts of New Jersey or other discipline.

A hearing was held by respondent in his chambers on May 3, 1968. At the conclusion of the hearing respondent ordered that the privilege extended to F. Lee Bailey, Esquire, to appear as counsel for petitioners be revoked. Thereupon, the above mentioned petition was filed in this Court and a hearing held on May 7, 1968.

Petitioners contend that: (1) The order of the respondent deprives them of rights secured to them by the Fifth[3] and Sixth[4] Amendments to the United States Constitution, made applicable to the States by the Fourteenth[5] Amendment. (2) They are entitled to an order of this Court restraining enforcement of the State court order.

The question of jurisdiction to enjoin State court crimi-

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[3] AMENDMENT V:

No person shall be ... deprived of life, liberty, or property, without due proces sof law ....

[4] AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to have the Assistance of Counsel for his defence.

[5] AMENDMENT XIV:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ...

nal proceedings in a case of this kind is not entirely free of doubt. The doubt arises because of the provisions of 28 U.S.C. 2283 which reads:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

It has been held, however, in this Circuit that there is jurisdiction. *Cooper* v. *Hutchinson,* 184 F.2d 119, (3rd Cir. 1950). But it has been held otherwise in the Fourth Circuit. *Baines* v. *City of Danville,* 337 F.2d 579 (4th Cir. 1964). Also see *Island Steamship Lines* v. *Glennon,* 178 F.Supp. 292 (D.C.Mass. 1959). The United States Supreme Court left the question unsettled in the recent case of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) when it commented in a footnote: "We therefore find it unnecessary to resolve the question whether suits under 42 U.S.C. §1983 (1958 ed.) come under the 'expressly authorized' exception to §2283." Id. at 484. See 21 Rutgers Law Review 92 (1966). However, in *Dombrowski* the Court did observe that:

> [C]onsiderations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary

to justify a disruption of orderly state proceedings. Id. at 484-85.

In the absence of a United States Supreme Court decision settling the question of jurisdiction, this Court is bound to observe the Third Circuit holding in the *Cooper* case to the effect that there is jurisdiction. But it must also observe the admonition that, "[I]t is a very delicate matter for a federal court to interefere with the processes of state courts. It is even more delicate when the processes sought to be interfered with are prosecutions for crime brought by the state in its own courts." Id. at 125.

It is recognized that the right to assert a claim under the Federal Civil Rights Act in a federal court is not dependent upon exhaustion of state remedies. *Lane* v. *Wilson*, 307 U.S. 268, 274-75 (1939). But the granting of equitable relief such as that sought here invokes the exercise of sound discretion. Such discretion must be sparingly exercised if we are to observe "[T]he delicate balance between state and federal authority and the inadvisability of federal court interference with a state prosecution." *U. S. ex re Schaedler* v. *Common Pleas Court*, 242 F.Supp. 526, 527-28 (E.D.Pa. 1965).

It has been urged in this Court that by appealing to the Executive and Legislative branches of the government counsel was doing nothing more than exercising petitioners' First Amendment right of freedom of speech under the Federal Constitution. This right is not so unrestricte d that the exercise of it can be permitted to interfere with the fair and impartial administration of justice, particularly in a case to be tried by a jury. Where the line should be drawn between permissible utterances for publication and those which jeopardize due process in the judicial system has been a much debated subject. See *"A Free Press And A Fair Trial"*, Villanova Law Review, Vol. 2, No. 4, pp.

677-741 (1966). Generally any statements made by counsel out of court for publication, or made accessible for publication, during the course of a judicial proceeding have been disapproved. See Canon 20 of the Canons of Professional Ethics adopted by the American Bar Association and New Jersey Rule R.R. 1:25.

Conceding for the purpose of argument that the propriety of the action taken was debatable, it is further urged that it was prompted by most extenuating circumstances which induced Mr. Bailey to believe that relief from the kind of treatment to which his clients were subjected at the hands of the prosecution was not available through the channels of the Judicial branch of the Government. A complete record of what was deemed to have been such extenuating circumstances has been developed for reference upon any further judicial review of this matter.

However mistaken the conclusion reached by Mr. Bailey may have been, the crucial question now is whether what was done by him so prejudicially deprived the State of its right to a fair trial as to justify the deprivation of petitioners' right to services of counsel of their own choice at a late stage of the prosecution. It is argued that the injury to petitioners far outweighs any prejudice to the State. The argument places in focus the relative constitutional considerations which emerge. Disciplinary action by the court directed against an attorney stands in a different category than an order of the court which prevents his clients from having the benefit of his services during trial. This is not to suggest that such action may not be appropriate in a particular case, but the Sixth Amendment right of clients to the assistance of counsel of their own choice must be given consideration.

There is no doubt about the fact that a defendant in a criminal case has a right to be represented by counsel of his own choice, *United States* v. *Bergamo*, 154 F.2d 31

(3rd Cir. 1946), but it does not follow that the exercise of such right strips a court, whether federal or state, of its obligation to control the proceedings before it to the end that there is effective administration of justice. Effective administration of justice means not only a fair trial for a defendant, but also a fair trial for the State. This Court expresses no opinion as to whether the action of Mr. Bailey in writing to the Governor of the State of New Jersey and distributing copies of his correspondence to legislators and members of the American Polygraph Association had such prejudicial effect on the right of the State to a fair trial as to outweigh the constitutional right of petitioners to have counsel of their own choice represent them.

Upon careful consideration of this matter it is concluded that the federal court, in the exercise of its equity jurisdiction, should not resolve the question presented, but should stay its hand until petitioners present the opportunity to a State court for appellate review. Moreover, nothing herein stated is to be construed as indicating any opinion this Court may have as to the merit of petitioners' application. A proper respect for the State judicial system dictates such restraint.

A petition for intervention has been filed by other defendants charged by indictment with the murders of Judith Kavanaugh and Gabriel DeFranco and the application for intervention has been granted and an order entered.

Now, therefore, it is on this 8th day of May, 1968, ORDERED that jurisdiction is retained and that all further proceedings herein by petitioners Harold Matzner and Dorothe Matzner and the applicants for intervention are stayed to afford opportunity to them, on prompt application, to seek State court review of the order of the trial court.

Further ORDERED that the record developed at the hearing held in this Court be impounded except as to avail-

ability to a New Jersey State court through counsel for such use in any proceedings therein conducted as may be deemed appropriate by such State Court.

(s) ROBERT SHAW
ROBERT SHAW
U. S. District Judge

SUPREME COURT OF NEW JERSEY
A-161 September Term 1967

STATE OF NEW JERSEY,
PLAINTIFF-RESPONDENT,

v.

PAUL KAVANAUGH, VINCENT KEARNEY, JR.,
HAROLD MATZNER and DOROTHE KRUEGER,
DEFENDANTS-APPELLANTS.

STATE OF NEW JERSEY,
PLAINTIFF-RESPONDENT,

v.

VINCENT KEARNEY, JR.,
HAROLD MATZNER and JOHN C. DE GROOT,
DEFENDANTS-APPELLANTS.

Argued May 20, 1968 — Decided May 29, 1968
On appeal from interlocutory order of the
Superior Court, Law Division, Passaic County.

Mr. F. Lee Bailey, of the Massachusetts bar, and *Mr. Joseph T. Afflitto* argued the cause for appellants Matzner and Krueger.

Mr. Bruno L. Leopizzi argued the cause for intervenor Kearney and *Mr. Leonard I. Garth* argued the cause for intervenor De Groot (*Mr. Miles Feinstein,* on the brief; *Messrs. Cole, Berman and Garth,* attorneys for intervenor De Groot).

Mr. Arthur J. Sills, Attorney General of New Jersey, argued the cause for respondent (*Mr. Joseph A. Hoffman,* First Assistant Attorney General, of counsel and on the brief; *Mr. Elias Abelson,* Deputy Attorney General, on the brief).

The opinion of the Court was delivered PER CURIAM.

This is an appeal from an order revoking permission theretofore extended under *R. R.* 1:12-8 to F. Lee Bailey, a member of the Massachusetts bar, to appear *pro hac vice* for defendants Harold Matzner and Dorothe Krueger in the first captioned matter and for defendant Harold Matzner in the second captioned matter. After the trial court entered the order, the defendants instituted a proceeding in the United States District Court for the District of New Jersey directly against the trial judge to restrain him from enforcing that order. The Federal Court concluded that defendants should exhaust their State remedy. Thereupon defendants sought leave to appeal which we granted. The other defendants to the indictments were permitted to intervene.

The indictments are for murder. Two homicides are involved and the State contends they are related. The homicides themselves attracted an unusual amount of public attention. Interest was added when the defendants retained Mr. Bailey, a highly publicized lawyer. The problem of a fair trial emerged rather early. With that pro-

blem in mind, the trial court dealt with certain motions *in camera* so that there might not appear in the press matters which could interfere with the trial. Despite such precautions, the trial court found it necessary to order that a jury be selected from residents of another county.

In this setting Mr. Bailey circulated a letter which led to the termination of his privilege to appear *pro hac vice* in these cases. The letter, mailed from Boston, is dated April 24, 1968. The timing is significant. A special jury panel was to be drawn on May 10, 1968, the trial itself to begin on May 20 or June 3 (for present purposes it is not important which was the designated date when the letter of April 24 was mailed). Mr. Bailey's letter, addressed to the Governor of our State, reads:

> "I am writing to call to your attention a matter which I consider to be of most serious consequence to the man I represent and to the State of New Jersey. I am about to commence a trial wherein the prosecutor presenting the case is fully aware that the only witness he has intends to lie and give a fully fictional account of a murder allegedly committed by my client.
>
> Harold Matzner of Denville, New Jersey, was indicted in June, 1967 for the murder of Judy Kavanaugh and in October, 1967, for the murder of Gabriel DeFranco. I have represented him since the first indictment. I have never, in any state or federal court, seen abuses of justice, legal ethics, and constitutional rights such as this case has involved. It was apparent from the start that the 'witnesses' to each murder were persons utterly without human value. Both are convicts and both have been pressured or bribed by the prosecution to give their stories and thus knowingly jeopardize the lives of five completely innocent people, all of whom have been cleared

by polygraph tests administered by nationally recognized experts.

One trial involves three defendants and one involves four: two, including my client, are defendants in both cases.

It was my original intent that the trial itself be the medium of exposing this disgraceful situation. However, some weeks ago, there suddenly appeared a special prosecutor in the person of James Dowd. It was DeFranco trial was scheduled for April 22 as a day certain. A week prior to its commencement, Mr. Dowd attempted to obtain a continuance to 'further investigate' the case with which he had become recently acquainted. I objected, and his motion was denied. Sensing that Mr. Dowd's purpose might serve some more noble value than the purposes of his predecessors, I conferred with him privately in the presence of his equally honest and competent assistant, Richard McGlynn. Upon his representation that, (1) he was in charge of the case; and (2) he had a sincere desire to determine whether or not his chief witness was a perjurer, I reversed my original stand and assented to a continuance.

Mr. Dowd was as good as his word. He did determine that Edward Lenney, the alleged eye-witness, had in fact offered a completely perjured story, and that he had been assisted in its concoction by officials of the State of New Jersey. Mr. Dowd wished that the indictment immediately be dismissed and the defendants be cleared of all suspicion. The defendants agreed. Before this could be done, however, representatives of the office of the prosecutor, John Thevos, made contact with Edward Lenney as a result of which he turned around once again and reverted to his false story. The State of New Jersey now proposes to

go forward with this trial in order that those officials guilty of felonious conduct may be to some degree protected. My client, therefore, is offered the opportunity to fall into the classic American syndrome of the damnation of an acquittal. I do not propose that this should be allowed.

Should this trial proceed as is presently planned, the stench arising from it will hold the State of New Jersey up to ridicule such as has beset no organ of government since the abolition of Star Chamber. Although there would be a certain pleasure in bringing to book these officials in the spotlight of a murder trial, I believe it to be in the best interests of my client to urgently request that an immediate investigation be made to determine whether or not Mr. Dowd is being forced by orders from superiors to offer in an American courtroom a man he knows to be a complete and utter liar. The money and effort of which the taxpayers will be defrauded in such a trial could much better be spent in conducting the investigation that would lead tothe disbarment and incarceration of those responsible for this travesty.

The press has been throttled in this case to the extent that the public is almost wholly unaware of what is being perpetrated. As of the day our trial jury is sequestered, I intend that the entire matter be aired. I hope that some action on your part will precede such an unfortunate event. Thank you very kindly for your attention to this matter."

The press had the letter even before it reached the Governor's office,[1] and it received press coverage beginning on

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[1] At the hearing below Mr. Bailey said:

"* * * Before the certified letters reached their addressees, the news media had the letter. I haven't the vaguest idea how."

the 25th. On the 26th, the Governor's office advised the Chief Justice of the receipt of the letter.

We considered Mr. Bailey's letter at our conference on April 30, in the exercise of our administrative responsibility. We thought if fair to infer that a letter on Mr. Bailey's letterhead, widely published and not disavowed by him during a period of five days, was probably written by him. At the hearing below Mr. Bailey sharply questioned our basis for that inference, but before us he conceded that our judgment in that regard was not rash. As to the content of the letter, it seemed to us, in the absence of some extraordinary explanation, to bespeak inescapably a purpose to reach the public domain. The professed object was to induce the Governor to intercept an imminent trial by conducting some kind of an inquiry wherein he would necessarily adjudge the very issue involved in the trial of the indictment. We could understand a layman laboring under some such misunderstanding of the processes of government, but every lawyer has to know the judiciary exists precisely to discharge that function of government, and indeed that no other process of government can match the judicial process in its capacity to resolve a disputed issue of fact.

Hence, barring some explanation beyond our power to anticipate, Mr. Bailey's purpose had to be to reach prospective jurors. Upon that view, it is hardly necessary to spell out the gross improprieties of that brash document. Yet the closing paragraph deserves special mention, for it tells the reader that more is to come. The prospective jurors are thus informed that while they, sequestered, are fed evidence the prosecution has concocted, the rest of the world will be receiving the untarnished truth from Mr. Bailey. If so to read the last paragraph should seem extravagant, still it had to mean at a minimum that while the trial is on, Mr. Bailey will make releases to the public

of things which cannot be shown in the courtroom. That promised spectacle of course would be intolerable.

For these reasons we concluded that, wholly apart from future disciplinary proceedings, Mr. Bailey's permission to try these particular cases had to be questioned. Absent some explanation, or some equity in the clients, we were satisfied the letter itself constituted a *prima facie* basis requiring the revocation of leave granted him. Rather than issue an order returnable before us, we sent the matter to the trial court, there to afford Mr. Bailey and his clients a hearing wherein they could show cause, whatever it might be, why the permission given to Mr. Bailey to appear in these cases should not be rescinded. We therefore sent the following directive on April 30 to Judge Gordon H. Brown, the judge to whom the indictments had been assigned for trial:

> "The Court, on the basis of a published letter from F. Lee Bailey, Esquire, to Governor Hughes, dated April 24, 1968, directs that you revoke the permission heretofore given to Mr. Bailey to appear as counsel in the Kavanaugh and related matters unless the said Bailey or his client shows cause satisfactory to you to permit him to remain as counsel in said matters.
>
> A hearing to that end is to be held by you forthwith. At such hearing, you shall make inquiry as to the extent of the distribution of said letter and counterparts thereof addressed to others. The foregoing is independent of such action as the Supreme Court may itself take with respect to a permanent bar of Mr. Bailey from appearing in the courts of New Jersey or other discipline."

Our directive was communicated by telephone to Judge Brown who on the same day wrote and wired Mr. Bailey:

"You are hereby directed to appear forthwith at my courtroom for an *in camera* hearing as to the authorship and distribution of a letter to Governor Hughes dated April 24, 1968. Your clients, Harold Matzner and Dorothe Krueger must also attend together with Mr. Afflitto."

Mr. Bailey responded on the wrong foot. He wired Judge Brown:

"Your directive telegram received this morning I have commitments for the balance of this week but will make myself available Friday morning at 10 A.M. Objection is hereby interposed to any further in camera proceeding in this case on the ground that were it not for violations of the First Amendment which have already occurred these indictments would have been disposed of as fraudulent by public officials not permitted to conceal their doings from the citizenry. Requesting that full and fair hearing be held into #1 the causes for the postponement of the April 22 date and the representation by an authorized state official that the indictments would be dismissed if perjury were found to [2] whether such perjury was found and be [3] by whom it was suborned Detailed letter follows."

Mr. Bailey's letter, which followed, was in the same vein. Mr. Bailey recognized that "You, of course, have a right to inquire as to deliberate news releases, and I assume that any hearings be limited to that issue." He added a request that the hearing also embrace the truth of essentially the same charges contained in his letter of April 24 to the Governor, to which subject we will refer later.

The hearing before Judge Brown was held on May 3,

the date Mr. Bailey suggested in his telegram. The relevant issues were: (1) whether Mr. Bailey wrote the letter and intended the letter to reach the news media or acted with reckless indifference to that prospect; (2) if he did, whether cause nonetheless existed to permit him to continue at our Bar in those cases, which would involve (a) the prospects for Mr. Bailey's proper behavior, and (b) the impact upon Mr. Bailey's clients of the loss of his services.

As to the first, the hearing eliminated any possible doubt concerning Mr. Bailey's intent and expectation. He presented his secretary's affidavit, which revealed that originals of the letter of April 24 were sent by certified mail to:

> The Governor of New Jersey
> Attorney General of New Jersey
> United States Attorney for the District of New Jersey
> President of the New Jersey Bar Association
> Attorney General of the United States

and that copies of the letter to the Governor went to:

> All Assemblymen
> All State Senators
> All United States Congressmen
> All United States Senators
> 16 members of the American Polygraph Association.

Mr. Bailey said he thought that not all of the members of the Congress received the letter but only those from the State of New Jersey. That limitation accepted, the letter went to more than 150 persons.

It escapes us how a lawyer could believe that those recipients, severally or collectively, could make a dispositive finding of the truth of his charges in time to obviate the impending trial of the indictment, or that any of them, if able so to do, would thus interefere with a matter before the judiciary on the basis of charges by him. Nor can we credit Mr. Bailey's amazement that someone turned the letter over to a reporter. Before us, Mr. Bailey admitted that he did not caution the recipients against that course, and offered the curious explanation that he felt secure in that regard because, by reason of the law of libel, no one who received the letter would release it and no news media would use it. Finally we note that although Mr. Bailey says he consulted other counsel in this case with respect to whether the courts of our State would entertain a proceeding by a defendant to compel a dismissal of an indictment, he conceded before us that he consulted none of them — not even Mr. Afflitto, who was counsel of record for his clients — before sending the letter of April 24. We think Mr. Bailey sensed that none of them would have countenanced that course.

Hence we do not have the slightest doubt that Mr. Bailey intended that letter to reach the press. Nor did anything emerge at the hearing to dissipate the gross ethical impropriety evident in the letter itself. On the contrary the hearing demonstrated that the letter also violated a specific order of the trial court. Less than two months before, Judge Brown had forbidden in explicit terms any public disclosure of the alleged results of polygraph tests. The occasion was the filing of a motion in February 1968 concerning the admissibility at trial of polygraph tests. The motion having been filed with the Clerk of the Court, it became available to the press. Attached was an affidavit asserting that Mr. Bailey's clients had been given such tests, with of course the oblique intimation that they

passed. The press carried the story. As a result, Judge Brown, on February 28, 1968, warned all counsel:

> "If there is any further reference in any form by a lawyer in either of these cases to a specific polygraph or lie detector test before a ruling by the Supreme Court that such a so-called test is a reliable indication of truth, the conduct will be prosecuted as contempt of court."[2]

Nonetheless the letter of April 24 states the alleged results of alleged polygraph tests.

As we mentioned above, one of the relevant issues at the hearing was whether Mr. Bailey could give assurance as to future behavior if permitted to stay in the cases. On that score, Mr. Bailey's performance offered no promise. He apparently elected to attack. We have already referred to his telegram to Judge Brown which adhered to the theme of the letter of April 24. Of our directive under which Judge Brown was holding the hearing, Mr. Bailey said:

> "Now, I will state for the record right now, although I object to doing it in chambers, because I have not been given the privilege of chambers insofar as that rotten letter from your Supreme Court, rotten only because it was distributed to the news media. * * *"

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[2] Our cases, and quite uniformly the decisions elsewhere, exclude the results of such tests for the reason that, however useful they may be as investigational tools, they are too unreliable for the courtroom. *State* v. *Driver*, 38 N.J. 255, 260 (1962); *State* v. *Walker*, 37 N.J. 208, 214-216 (1962), *cert. denied*, 371 U.S. 850, 9 L. ed. 2d 86 (1962); *State* v. *LaRocca*, 81 N.J. Super. 40 (App. Div. 1963); *State* v. *Arnwine*, 67 N.J. Super. 483 (App. Div. 1961); Annotation, 23 A.L.R. 2d 1306, 1308 (1952); see, Wigmore, *Evidence* (3d ed. 1940), § 999, p. 645; McCormick, *Evidence* (1954), § 174, p. 369.

Later he added:

> "The risk of publication is always present if I sent one letter to the attorney general. I gather from the conduct of your Supreme Court that it is entirely proper to publish communiques. They have set a shining example, so I don't know why anybody takes the time to criticize me. * * *."

Thus Mr. Bailey apparently conceives that his extra-judicial utterances are on a par with the orders of this Court insofar as public information is concerned.

Nor could Mr. Bailey see any possible fault on his part with respect to the publication. The blame had to be elsewhere, and, as he put it, with some "politician." The transcript reads:

> "The Court: With that many copies out are you really surprised that one fell into the hands of the press?
>
> Mr. Bailey: Yes, I am. A politician decided to release it. Is it relevant who did that? Was it the Governor?
>
> The Court: Was it foreseeable?
>
> Mr. Bailey: I don't think that it was foreseeable and if that were foreseeable it would be irrelevant."

Finally, after Judge Brown gave his decision, Mr. Bailey said:

> "All right, Judge, just in case your order should stick let me ask you something. How do you feel at this point? I ask you in front of these clients. Aren't you a little bit disgusted with yourself for having made up that ruling knowing that I have not violated your orders? You took an oath like I did. * * *"

Before us, taken to task for his reference to our "rotten" order, and for the incredible insult to Judge Brown just quoted, Mr. Bailey did apologize in those respects. But what did not come through was any sense of fault or contrition with respect to his letter of April 24. At the very end of the argument before us, he still placed the blame elsewhere, saying that "if I had to do it over again, I would not send copies to Assemblymen because it is now demonstrated that this is a leak I did not then anticipate."

The final relevant aspect of the matter relates to the impact of Mr. Bailey's removal upon his clients, the intervenors, and their respective counsel. We have no doubt the removal of Mr. Bailey will have an appreciable impact upon all of them in some respect. The intervenors press their desire for a prompt trial, and their counsel, having arranged their calendars in the light of the expected trial date, undoubtedly are personally injured by a postponement. But a postponement is unavoidable even if Mr. Bailey remained, and this because of Mr. Bailey's misbehavior. The State believes Mr. Bailey's letter interferes with its right to a fair trial, and we cannot discount that fear. Indeed the ensuing publicity may well hurt all defendants if a trial were held at this moment.

Further, it may be that the Prosecutor will have to assign new counsel because of the events referred to in Mr. Bailey's letter of April 24. As there reflected, a key witness for the State with respect to the indictment scheduled for trial retracted an earlier statement, but thereafter withdrew the retraction. The retraction was obtained by Mr. Dowd, who had been engaged specially by the County Prosecutor to try the case. If the witness continues to disavow the retraction, there doubtless will be explored at trial the events which transpired between the witness and Mr. Dowd. Thus Mr. Dowd may have to testify. It is against our policy for an attorney to try a

case when he knows he will probably be a witness. The reasons are obvious. The Prosecutor should make a decision forthwith; in the light of all the facts known to him, as to whether Mr. Dowd must step aside, and if he must, as seems likely, there will be a second reason why the contemplated trial will have to be delayed.[2a]

Since the trial must be postponed, there will be a full opportunity for Mr. Bailey's clients to obtain other counsel. No doubt, as defendants say, the investigation has been extensive, but it remains the kind of a case that another lawyer can readily grasp. The investigation to date, which must be quite complete, is and will be available. A delay undoubtedly involves financial hurt, but the damage was done by Mr. Bailey when he sent his letter of April 24. As to the extra dollar hurt to Mr. Bailey's clients, involved in changing counsel, the matter must be left for an accounting between them.

It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. There must be a fair trial, both for a defendant and for the State. The conduct here involved invaded that interest. But of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process. The antics here involved spill over upon the right of all litigants to expect justice in the courtroom and in accordance with the rules of law. We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order.

[2a] Since the preparation of this opinion we learned that Mr. Dowd and Mr. McGlynn have resigned their appointments.

We should speak of some other matters which were advanced but are not involved.

Mr. Bailey's clients urge a constitutional right to select an attorney who is not a member of our Bar. So long as the Bar of our State is able, willing and free to provide effective counsel, there is no such right. *Thomas* v. *Cassidy*, 249 F. 2d 91 (4 Cir. 1957), *cert. denied*, 355 U. S. 958, 2 L. ed. 2d 533 (1958); *People* v. *Epton*, 248 F. Supp. 276 (S.D. N.Y. 1965); see *Parker* v. *Parker*, 97 So. 2d 136 (Dist. Ct. App. Fla. 1957); *Johnson* v. *DiGiovanni*, 347 Mich. 118, 78 N. W. 2d 560, 565 (Sup. Ct. 1956). This is not a situation in which no member of the local Bar will act. See *Lefton* v. *City of Hattiesburg, Mississippi*, 333 F. 2d 280 (5 Cir. 1964). There is no dearth of competent attorneys in our State ready to meet the constitutional right to counsel. There is nothing provincial about the requirement for admission to practice in the courts of a State. The courts of every jurisdiction must have control of practice before them as an "incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." *Cohen* v. *Hurley*, 366 U. S. 117, 123-124, 6 L. ed. 2d 156, 162 (1961).[3]

Defendants refer to *United States* v. *Bergamo*, 154 F. 2d 31 (3 Cir. 1946), but that case dealt with practice in the federal courts. This was made clear in *Cooper* v. *Hutchinson*, 184 F. 2d 119 (3 Cir. 1950), where the same court described as "startling" the suggestion that the courts of the States are bound to permit out-of-state attorneys to practice before them (p. 122). The *Cooper* case goes no further than to say that a constitutional issue is projected if an attorney admitted *pro hac vice* is removed in midstream for no reason at all and without a chance to be heard. See *Laughlin* v. *Eicher*, 145 F. 2d 700 (D.C. Cir.

[3] Overruled in other respects, *Spevack* v. *Klein*, 385 U.S. 511, 17 L. ed. 2d 574 (1967).

1944), *cert. denied,* 325 U. S. 866, 89 L. ed. 1985 (1945); *United States* v. *Madsen,* 148 F. Supp. 625 (D. Alaska 1957).

Nor is there involved the right to complain to other officers of the State or to officers of the Federal Government. Mr. Bailey was free to write to anyone in the world. What he could not do was to write with the intent, or with a reckless disregard of the high probability, that his letter would enter the public domain if the letter would violate the ethical concepts stated in Canon 20 and expounded in *State* v. *Van Duyne,* 43 N. J. 369 (1964), *cert. denied,* 380 U. S. 987, 14 L. ed. 2d 279 (1965). We expressly noted that the restraints applied as well to the defense (p. 389):

> "The ban on statements by the prosecutor and his aides applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible."

These views had to be known to Mr. Bailey, who appeared in *Sheppard* v. *Maxwell,* 384 U. S. 333, 361, 16 L. ed. 2d 600, 619-620 (1966), where the Court said:

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable

> testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State* v. *Van Duyne*, 43 N. J. 369, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements."

and further (384 U. S. at 363, 16 L. ed. 2d at 620):

> "* * * The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

Mr. Bailey's affront did not arise out of the fact that he wrote to the public officers or even to members of the American Polygraph Society. He misbehaved because he beamed the communication to the public.

Finally, we refer to Mr. Bailey's claim that he had been advised by other counsel in the case that there was no proceeding for the enforcement of his clients' alleged rights. Of course, if there were a right to relief, our courts would be open. We gather that what other counsel said was that there was no basis for relief, rather than lack of remedy, when the claimed grievance is necessarily involved in the trial of the indictment itself. Ordinarily, of course, that must be true, for there is no reason for a "pretrial" trial of the truth of the indictment, to say nothing of the problem that practice would involve if the

"pretrial" trial should result in a finding, express or implied, that the defendant is guilty. And if Mr. Bailey meant that counsel told him there was no basis for a claim of a "contract" to nolle pros, again the advice would be correct since it is fundamental in our State that no indictment may be nolle prossed without the approval of the court. R. R. 3:11-3(a); *State* v. *Ashby*, 43 N. J. 273 (1964). That, incidentally, is the federal rule as well. Fed. R. Crim. P. 48(a). But none of this is at all relevant.[4] Mr. Bailey's misbehavior did not lie in bringing a frivolous motion or instituting a frivolous suit. He did no such thing. On the contrary, he went to the mass media at a time and in terms which interfered with the fair trial of a matter before the judiciary. For this reason, Judge Brown correctly refused to be diverted by Mr. Bailey's request that there be tried the truth of his charges in his letter of April 24.

The order is affirmed.

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[4] In the federal proceeding, the court permitted Mr. Bailey to place Mr. Dowd and his associate, Mr. McGlynn, on the stand to explore conversations with Mr. Bailey and also their beliefs or state of mind with respect to the State witness who recanted. The United States District Court permitted that examination to the end that the testimony would be available to us on this appeal for whatever mitigating effect it may have. Defendants offered the transcript. We, however, declined to accept it. The examinations of Mr. Dowd and Mr. McGlynn seemed incomplete, and probably because the Attorney General declined to participate in that interrogation. In any event, on the facts, as we find them, nothing said by Mr. Dowd or Mr. McGlynn or intimated by Mr. Bailey in his examination of them could explain or palliate the misconduct.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PREME COURT, U. S.

SEP 7 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 393

HAROLD and DOROTHE MATZNER,

Petitioners,

v.

THE STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
COUNTER-QUESTIONS PRESENTED	2
CONSTITUTION AND RULES INVOLVED	2
COUNTER-STATEMENT OF FACTS	2
ARGUMENT:	
Point I—There is no final decision in this matter upon which certiorari can be granted	12
Point II—The interlocutory ruling of the trial court affirmed by the New Jersey supreme court should be sustained on the ground that it is a matter relating to the control of procedures of the courts of the state uniquely within the purview of the highest court of the state, and further that the federal constitutional rights of petitioners are not affected by the New Jersey supreme court's disciplinary action against its officers	17
A. Control of State Court Proceedings and Discipline of the Bar is Uniquely a State Concern	17
B. The Discipline of Counsel Did Not Deprive Petitioners of Constitutionally Guaranteed Rights	23
C. The Judicial Discipline of F. Lee Bailey Was Warranted and Proper	25
CONCLUSION	26

PAGE

Cases Cited

Alexander v. United States, 201 U. S. 117 (1906).... 14

Andrews v. United States, 373 U. S. 334 (1963)..... 16

Baron, In re, 25 N. J. 445, 136 A. 2d 873 (1957)..... 20

Cape May Co. Bar Ass'n. v. Ludlam, 45 N. J. 12, 211 A. 2d 780 (1965)..... 18

Chafee v. Quidnick Co., 13 R. I. 442 (1881)..... 20

Cobbledick v. United States, 309 U. S. 323 (1940).12, 14, 15

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949)..... 15

Cohen v. Hurley, 336 U. S. 117 (1961)..... 18

Cooper v. Hutchinson, 184 F. 2d 119 (3rd Cir. 1950).20, 24

George Siegler Co. v. Norton, 8 N. J. 374, 86 A. 2d 8 (1952) 19

Herr, In re, 22 N. J. 276, 125 A. 2d 706 (1956)..... 20

Introcaso, In re, 26 N. J. 353, 140 A. 2d 70 (1958).... 20

Kendall v. United States, 37 U. S. (12 Pet.) 524 (1838) 19

Parker v. Parker, 97 P. 2d 136 (Fla. App. 1957)..... 20

Parr v. United States, 351 U. S. 513 (1956).....15, 16

Pfizer, In re, 6 N. J. 233, 78 A. 2d 80 (1951)..... 19

People of New York v. Epton, 248 F. Supp. 276 (D. C. N. Y. 1965)..... 20

Saier v. Michigan, 293 F. 2d 756 (6th Cir. 1961)..... 18

Segurola v. United States, 275 U. S. 106, 72 L. ed. 186, 48 S. Ct. 77..... 14

Sheppard v. Maxwell, 384 U. S. 333 (1966)..... 20

PAGE

State v. Kavanaugh, et al., 52 N. J. 7 (1968) 1

State v. Otis Elevator Co., 12 N. J. 1, 95 A. 2d 715 (1953) 19

State v. Van Duyne, 43 N. J. 369, 204 A. 2d 841 (1964), cert. denied, 380 U. S. 987 (1965) 20, 21

Swift & Company Packers v. Compania Colombiana, 339 U. S. 684 (1950) 15

Thomas v. Cassidy, 249 F. 2d 91 (4th Cir. 1957) 20

United States v. Bergamo, 154 F. 2d 31 (3 Cir. 1946) 24

Wasserman, Application of, 240 F. 2d 213 (9th Cir. 1956) 20

New Jersey Constitution Cited

1947—

Article VI, Section VII, Paragraph 1 .....2, 18, 19

Section II, Paragraph 3 .....2, 18, 19

Statutes Cited

28 U.S.C.:

Sec. 1257 12

Sec. 1257 (3) 2, 12

Canons of Professional Ethics:

5 20

20 20

Rules Cited

R.R. 1:12-8 .....2, 19, 20

R.R. 1:26-6 .....2, 19, 20

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of New Jersey reported in *State* v. *Kavanaugh, et al.*, 52 N. J. 7 (1968), is reproduced in the appendix to petitioners' brief at Pb9a through 26a.

Jurisdiction

The jurisdictional basis for the petition is 28 U.S.C. §1257(3); however, petitioners do not satisfy the considerations necessary for the grant of a writ of certiorari by this Court as set forth in that statute in that the order affirmed by the New Jersey supreme court is not a final judgment or decree and does not concern new and important principles which require this court's supervision.

Counter-Questions Presented

1. Is the interlocutory order of the Superior Court of New Jersey affirmed by the Supreme Court of New Jersey a final judgment or decree within the meaning of 28 U.S.C. §1257(3)?

2. Did the Supreme Court of New Jersey act within the scope of its duty to protect the integrity of the judicial process when it disciplined counsel for petitioners?

3. Does the decision of the Supreme Court of New Jersey conflict with the decisions of the Supreme Court of the United States?

Constitution and Rules Involved

Art. VI, §VII, ¶1 of the Constitution of New Jersey.

R.R. 1:12-8 of the Rules Governing the New Jersey Courts.

R.R. 1:26-6 of the Rules Governing the New Jersey Courts.

Counter-Statement of Facts

Petitioners Harold Matzner and Dorothe Matzner are presently under two indictments for murder in the the first degree in Passaic County, New Jersey. Harold Matzner is charged with the murder of Judith Kavanaugh and Gabriel DeFranco. Dorothe Matzner is charged with the murder

of Judith Kavanaugh. The petitioners retained F. Lee Bailey, an attorney of Boston, Massachusetts, admitted to the bar of that state, to defend them in the trials to be held on the indictments. Mr. Bailey is not admitted to the bar in New Jersey. Pursuant to application Mr. Bailey was admitted to practice *pro hac vice* on October 31, 1967, by Judge Gordon H. Brown of the Superior Court, for the purpose of defending petitioners in the above matters. On that admission he was associated with local counsel, Joseph Afflitto.

On November 21, 1967 Judge Brown summoned Mr. Bailey before him to review a speech the latter had made in Atlantic City. At that time, and on the record, Judge Brown issued the following order:

> "From now on neither you nor any other attorney in the case can make any reference to the Kavanaugh or DeFranco cases to audiences or to the press in this or any other state. That is an admonition. That requirement, that condition will affect not only you, but everyone in the case." (Transcript of hearing of May 3, 1968 before Judge Brown, hereinafter referred to as Tr. at p. 42.).

In a letter to Judge Brown dated December 27, 1967, Bailey stated the following:

> "I do not challenge at this time your right to order me or any other lawyer involved in criminal litigation to refrain from comments about the merits of the case." (Tr. 42.).

Subsequently on February 28, 1968, in response to an article published in the *New York Daily News* on February 27, 1968 which carried the headline "Five Pass Kavanaugh Lie Test," defense attorneys were again summoned to ap-

pear before Judge Brown (Tr. 51). During that proceeding Judge Brown issued the following order:

> "If there is any further reference in any form by a lawyer in either of these cases to a specific polygraph or lie detector test before a ruling by the New Jersey Supreme Court that such a so-called test is a reliable indication of truth, the conduct will be prosecuted as a contempt of court." (Tr. 52).

Neither of the above orders were appealed nor was any objection made on the record.

On April 23, 1968 Mr. Bailey dictated a letter to his secretary, Patricia Days, relating to the case of *State of New Jersey* v. *Matzner, et al.* (Exhibit C-5; Tr. 10). Mr. Bailey then authorized Miss Day to sign and mail original letters to the following persons: the Governor and Attorney General of New Jersey, the U. S. Attorney for the District of New Jersey, the President of the New Jersey Bar Association, and the Attorney General of the United States. Mr. Bailey directed that copies of the letter to the Governor also be sent to the following persons: All assemblymen and senators of the State of New Jersey, all United States congressmen and United States senators from New Jersey and sixteen members of the American Polygraph Association. (See affidavit of Miss Patricia Days Exhibit C-1; Tr. 2). Thus, the letter went to more than 150 persons (Petitioners' brief 17a). All of these letters were sent at the same time, on April 24th (Tr. 21). No effort was made by Mr. Bailey to prevent publication of these letters (Tr. 21).

The press had this letter before it reached the Governor's office and it received widespread press coverage in various area newspapers commencing on April 25th. On April 26th, the Governor's office advised the Chief Justice of receipt of the letter (Pb13a to 14a).

Mr. Bailey's letter, addressed to the Governor of New Jersey, reads as follows:

"I am writing to call to your attention a matter which I consider to be of most serious consequence to the man I represent and to the State of New Jersey. I am about to commence a trial wherein the prosecutor presenting the case is fully aware that the only witness he has intends to lie and give a fully fictional account of a murder allegedly committed by my client.

Harold Matzner of Denville, New Jersey, was indicted in June, 1967 for the murder of Judy Kavanaugh and in October, 1967, for the murder of Gabriel DeFranco. I have represented him since the first indictment. I have never, in any state or federal court, seen abuses of justice, legal ethics, and constitutional rights such as this case has involved. It was apparent from the start that the 'witnesses' to each murder were persons utterly without human value. Both are convicts and both have been pressured or bribed by the prosecution to give their stories and thus knowingly jeopardize the lives of five completely innocent people, all of whom have been cleared by polygraph tests administered by nationally recognized experts.

One trial involves three defendants and one involves four: two, including my client, are defendants in both cases.

It was my original intent that the trial itself be the medium of exposing this disgraceful situation. However, some weeks ago, there suddenly appeared a special prosecutor in the person of James Dowd. It was apparent from our first encounter that this man was a very competent and also a very ethical

lawyer. The DeFranco trial was scheduled for April 22 as a day certain. A week prior to its commencement, Mr. Dowd attempted to obtain a continuance to 'further investigate' the case with which he had become recently acquainted. I objected, and his motion was denied. Sensing that Mr. Dowd's purpose might serve some more noble value than the purposes of his predecessors, I conferred with him privately in the presence of his equally honest and competent assistant, Richard McGlynn. Upon his representation that, (1) he was in charge of the case, and (2) he had a sincere desire to determine whether or not his chief witness was a perjurer, I reversed my original stand and assented to a continuance.

Mr. Dowd was as good as his word. He did determine that Edward Lenney, the alleged eye-witness, had in fact offered a completely perjured story, and that he had been assisted in its concoction by officials of the State of New Jersey. Mr. Dowd wished that the indictment immediately be dismissed and the defendants be cleared of all suspicion. The defendants agreed. Before this could be done, however, representatives of the office of the prosecutor, John Thevos, made contact with Edward Lenney as a result of which he turned around once again and reverted to his false story. The State of New Jersey now proposes to go forward with this trial in order that those officials guilty of felonious conduct may be to some degree protected. My client, therefore, is offered the opportunity to fall into the classic American syndrome of the damnation of an acquittal. I do not propose that this should be allowed.

Should this trial proceed as is presently planned, the stench arising from it will hold the State of New

Jersey up to ridicule such as has beset no organ of government since the abolition of Star Chamber. Although there would be a certain pleasure in bringing to book these officials in the spotlight of a murder trial, I believe it to be in the best interests of my client to urgently request that an immediate investigation be made to determine whether or not Mr. Dowd is being forced by orders from superiors to offer in an American courtroom a man he knows to be a complete and utter liar. The money and effort of which the taxpayers will be defrauded in such a trial could much better be spent in conducting the investigation that would lead to the disbarment and incarceration of those responsible for this travesty.

The press has been throttled in this case to the extent that the public is almost wholly unaware of what is being perpetrated. As of the day our trial jury is sequestered, I intend that the entire matter be aired, I hope that some action on your part will precede such an unfortunate event. Thank you very kindly for your attention to this matter." (Pb11a to 13a).

Mr. Bailey's letter was considered by the supreme court in conference and the conclusion reached that Mr. Bailey's permission to try the Matzner indictments be questioned. At this point in time the court was satisfied the letter itself constituted a *prima facie* basis for revocation of Mr. Bailey's permission to appear in the New Jersey courts in this matter (Pb14a to 15a).

The supreme court sent the matter to the trial court with instructions to have appellants' counsel appear and show cause why his permission to remain as counsel in the murder cases should not be rescinded. In response to this directive, Judge Brown ordered Mr. Bailey to appear forthwith for an *in camera* hearing concerning the au-

thorship and distribution of the letter to Governor Hughes. Petitioners and Mr. Afflito were also required to attend the hearing. Mr. Bailey's response was to object to an *in camera* proceeding and to request a hearing into the representations and assertions made by him in his letter to the Governor (Pb16a).

The hearing before Judge Brown was held on May 3, 1968. In that hearing Mr. Bailey admitted the dictation, authorization and dissemination of his April 24th letter (Pb17a). Mr. Bailey indicated he took no steps to prevent the publication of his letter or to indicate to each addressee that the letter was to be treated in a confidential manner (Pb17a-18a).

As a result of that hearing, Judge Brown found that the distribution of the copies of the letter was ". . . so extensive and uncontrolled, thus providing a potentiality for disclosure at the hands of each and every addressee, that his [Bailey's] conduct can be viewed as evidencing either an intent to induce publication or a reckless indifference to foreseeable risks of publications." Judge Brown also found that statements in the letter violated two express orders of the court as hereinabove set forth. He then rescinded the privilege extended to Mr. Bailey to appear as attorney for the petitioners herein in the Kavanaugh and DeFranco murder cases. Mr. Bailey's response to the trial court was blatantly insulting. He said:

> "All right, Judge, just in case your order should stick let me ask you something. How do you feel at this point? I ask you in front of these clients. Aren't you a little bit disgusted with yourself for having made up that ruling knowing that I have not violated your orders? You took an oath like I did." (Pb20a).

After the trial court entered the order, the petitioners herein instituted a proceeding in the United States District Court for the district of New Jersey directly against the trial judge to restrain him from removing Mr. Bailey from the case. The federal court concluded that defendants should exhaust their state remedies (Pb7a). During the course of that hearing Mr. Bailey offered testimony of witnesses in an attempt to substantiate the allegations in his letter. The opinion of Judge Shaw referring to this proceeding notes that "A complete record of what was deemed to have been such extenuating circumstances has been developed for reference upon any further judicial review of this matter." (Pb6a). In its order the United States District Court, referring to the record developed before it, required:

> "... that the record developed at the hearing held in this Court be impounded except as to availability to a New Jersey State court through counsel for such use in any proceedings therein conducted as may be deemed appropriate by such State Court." (Pb7a-8a).

Upon motion made, leave to appeal to the New Jersey supreme court was granted. After submission of briefs, oral argument was held on May 20, 1968. In the opinion and order of that court, rendered May 29, 1968, the court reviewed in detail Mr. Bailey's actions in sending the letter to the Governor and in responding to both the hearing before Judge Brown and the oral argument before itself. References to the testimony and other evidence offered in the United States District Court were considered irrelevant to counsel's conduct, and not permitted to be introduced. It is amply clear from a reading of the opinion of the court that the only issues deemed pertinent

were, first, whether Mr. Bailey wrote the letter to the Governor and others with the intent that it reach the news media or acted with reckless indifference to that prospect, and second, whether if the foregoing is demonstrated true to the satisfaction of the court, cause nonetheless exists to permit him to continue in these cases. In turn this last consideration involved (a) the prospects for Mr. Bailey's proper behavior and (b) the impact upon Mr. Bailey's clients of the loss of his services (Pb17a). The conclusions of the supreme court are unambiguously stated:

> "Hence we do not have the slightest doubt that Mr. Bailey intended that letter to reach the press. Nor did anything emerge at the hearing to dissipate the gross ethical impropriety evident in the letter itself. On the contrary the hearing demonstrated that the letter also violated a specific order of the trial court." (Pb18a).

Counsel's intent established, the court moved to the second consideration; that of his continued presence despite the manifested gross ethical impropriety.

> "As we mentioned above, one of the relevant issues at the hearing was whether Mr. Bailey could give assurance as to future behavior if permitted to stay in the cases. On that score, Mr. Bailey's performance offered no promise." (Pb19a).

Relevant to this issue:

> "It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. • • • We have

> weighed again and again whether that larger interest [of the public in the integrity of the judicial process] could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not." (Pb22a).

Turning then to the impact upon Mr. Bailey's clients of the loss of his services, the court found that the sixth amendment guarantee to counsel in criminal proceedings does not in the circumstances before it compel judicial acquiescence in the selected counsel of a particular defendant, but speaks solely to the assistance of a competent attorney during the course of proceedings.

On the basis of the foregoing findings, and those more articulately set forth in the full text opinion of the New Jersey supreme court at Pb9a through 26a, the order of Judge Brown rescinding Mr. Bailey's permission to appear on behalf of the Matzners was affirmed. Petitioners ask this court to review the New Jersey supreme court's affirmance of the interlocutory order of the trial judge.

One of the indictments, *State* v. *Kearney, et als.* involving defendants Harold Matzner, DeGroot and Kearney, is scheduled for trail on September 10, 1968 before Judge Brown at the County Court House, Middlesex County, New Jersey.

ARGUMENT

POINT I

There is no final decision in this matter upon which certiorari can be granted.

The jurisdiction of this court is invoked by petitioners under the provisions of 28 U. S. C. § 1257(3). This section permits the United States Supreme Court to review by writ of certiorari a final judgment rendered by the highest court of a state under circumstances not here relevant.

Petitioners here are seeking review by certiorari of an interlocutory order of a state court rendered in a state criminal proceeding. The case of *Cobbledick* v. *United States,* 309 U. S. 323 (1940) considers finality as a condition for review in federal appellate procedure, but our federal system makes it no less applicable and appropriate to state court proceedings and the finality requirement of § 1257. Speaking to this characteristic of federal appellate procedure, this court said:

> "It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate

appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases. An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. Cogen v. United States, 278 US 221, 73 L ed 275, 49 S Ct 118.

In thus denying to the appellate courts the power to review rulings at nisi prius, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying 'final judgments and decrees' in the Judiciary Act of 1789 and now expressed by 'final decisions' in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system. As an instrument of such policy the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceed-

> ing. Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation. . . .' Mr. Chief Justice Taft, in Segurola v. United States, 275 US 106, 112, 72 L ed 186, 189, 48 S Ct 77." (*Id.* at pp. 324-326).

In language singularly suited to the propriety of review of the instant petition Justice Frankfuter quoted from *Alexander* v. *United States,* 201 U. S. 117 (1906):

> "'In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. . . . This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit'." (*Id.* at p. 327).

It should be noted in this connection that the defendants, Matzners, have here petitioned for certiorari, not their attorney. His exodus from the cases, wholly prompted by his own conduct, imparts no finality to these criminal proceedings. These defendants cannot claim finality by reason

of the interlocutory disposition of the trial court as affirmed by the supreme court.

Justice Frankfurter continued:

> "It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the orderly progress of investigation should no more be encouraged in one case than in the other." (*Id.* at p. 327).

Cobbledick was repeated and enforced by this Court's holding in *Parr* v. *United States*, 351 U. S. 513 (1956):

> "In general, a 'judgment' or 'decision' is final for the purpose of appeal only 'when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.'
>
> • • •
>
> 'Final judgment in a criminal case means sentence. The sentence is the judgment.'" (*Id.* at p. 518).

In *Parr* this Court also rejected petitioner's contention that even if not final the action of the trial court fell within the exceptions to the rules of finality recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) and *Swift & Company Packers* v. *Compania Colombiana*, 339 U. S. 684 (1950):

> "In those cases, orders made during the course of a litigation were held appealable because they related to matters outside the stream of the main action and would not be subject to effective review as part of the final judgment in the action. Unlike the orders

> in those cases, this order [in Parr v. United States] was not a 'step toward final disposition of the merits of the case' and will 'be merged in the final judgment.' Cohen v. Beneficial Industrial Loan Corp., supra (337 US at p. 546). The lack of an appeal now will not 'deny effective review of a claim fairly servicable from the context of a larger litigious process.' Swift & Co. Packers v. Compania Columbiana del Caribe, supra (339 US at p. 689). True, the petitioner will have to hazard a trial under the Austin indictment before he can get a review of whether he should have been tried in Laredo under the Corpus Christi indictment, but 'bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.' Cobbledick v. United States, supra (309 US at p. 325)." (*Parr* v. *United States, supra,* at pp. 519-520).

Andrews v. *United States,* 373 U. S. 334 (1963) iterated the requirements of finality and spoke to a resentencing procedure, saying that until resentencing has actually occurred no final appealable judgment has arisen.

> "The basic reason for the rule against piecemeal interlocutory appeals in the federal system is particularly apparent in the cases before us. Until the petitioners are resentenced it is impossible to know whether the Government will be able to show any colorable claim of prejudicial error. The District Court may, as before, sentence the petitioners to the same 25 years' imprisonment; it may place one or both of them on probation; it may make some other disposition with respect to their sentences. But until the court acts, none of the parties to this controversy will have had a final adjudication of his claims by the trial court in these §2255 proceedings." (*Id.* at p. 340).

So here, until the trial of the Matzners proceeds and results in an adjudication it is impossible to know whether any claim of prejudicial error will arise. The Matzners may be acquitted. They may be completely content with the defense counsel who eventually represents them at their trial. They may desire to raise points of prejudicial error when the trial is over if conviction results. But until the judicial process has terminated, petitioners will not have a final adjudication reviewable by this court.

The action of the trial court, as affirmed by the state supreme court was unquestionably interlocutory in nature. It was a step taken in the course of an ongoing criminal proceeding, percipitated by the conduct of defense counsel and necessitated to ensure a just and impartial trial to all parties involved. Under no circumstances does it warrant the reversal of statutory and precedential policies against the granting of certiorari to review piecemeal the orders of a court in a state criminal proceeding prior to final adjudication.

POINT II

The interlocutory ruling of the trial court affirmed by the New Jersey supreme court should be sustained on the ground that it is a matter relating to the control of procedures of the courts of the state uniquely within the purview of the highest court of the state, and further that the federal constitutional rights of petitioners are not affected by the New Jersey supreme court's disciplinary action against its officers.

A. Control of State Court Proceedings and Discipline of the Bar is Uniquely a State Concern.

The activities of F. Lee Bailey, counsel for petitioners herein, after his admission *pro hac vice* to practice before the courts of this state in defense of the indictments

against the Matzners, have amply demonstrated his inability to comport himself within the ethical bounds established for a member of the New Jersey bar and, in fact, for a member of any bar in the United States. His refusal to observe the orders of the trial court; his gross breach of ethical conduct in sending the letter to the Governor and others, intended by him to reach the press (Pb18a); his gratuitous insults of the trial court and the New Jersey supreme court; his lack of any sense of fault or contrition (Pb21a); and his general attitude and demeanor which is clearly reflected in the record below, give ample basis for the disciplinary response of the judiciary.

The license to practice law, the continuation of such license, the regulation of the practice and procedure for disbarment and discipline are all matters which are within the province of the state court. *Cape May Co. Bar Ass'n.* v. *Ludlam,* 45 N. J. 12, 211 A. 2d 780 (1965); *Saier* v. *Michigan,* 293 F. 2d 756 at 759 (6th Cir. 1961).

> "History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for 'keeping the administration of justice and the standards of professional conduct unsullied.'" *Cohen* v. *Hurley,* 336 U. S. 117, 123-124 (1961).

Under the provisions of the New Jersey Constitution of 1947, art. VI, the chief justice of the supreme court is the "administrative head of all courts in the State," N. J. Const., art. VI, sec. VII, par. 1. And, ". . . under the settled construction of art. VI, sec. II, par. 3 of the Constitution

of 1947, the Supreme Court has exclusive and plenary power to promulgate rules governing practice and procedure in our courts. . . ." *George Siegler Co.* v. *Norton,* 8 N. J. 374, 381, 86 A. 2d 8, 12 (1952), see also, *In re Pfizer,* 6 N. J. 233, 78 A. 2d 80 (1951).

> "The rule making power of the Supreme Court . . . is not a privilege to be exercised by it [the court] at its option; on the contrary, it is a duty that the justices of the Supreme Court must exercise as part of their constitutional obligations. . . ." *State* v. *Otis Elevator Co.,* 12 N. J. 1, 14, 95 A. 2d 715 (1953).

This power is not derived solely from the state constitution but from the common law.

> ". . . [I]t is well settled that the highest court in any common law jurisdiction has such supervisory power, derived from the English Common Law, as it may find essential to the effective administration of justice within its jurisdiction." *Kendall* v. *United States,* 37 U. S. (12 Pet.) 524 (1838).

R.R. 1:26-6 of the New Jersey Rules of Court provides:

> "It shall be the duty of every judge and magistrate to abide by and enforce . . . the Canons of Professional Ethics."

In this state, an attorney of good standing from any other jurisdiction may, ". . . at the discretion of the court in which any cause is pending, be admitted *pro hac vice,* to speak in such cause in the same manner as an attorney or counsellor of this State. . . ." R.R. 1:12-8. It has long been considered a privilege, rather than a right, for an

out-of-state attorney to be permitted to practice within another state. *Thomas* v. *Cassidy*, 249 F. 2d 91 (4th Cir. 1957); *People of New York* v. *Epton*, 248 F. Supp. 276 (D. C. N. Y. 1965); *cf. Cooper* v. *Hutchinson*, 184 F. 2d 119 (3rd Cir. 1950); *Application of Wasserman*, 240 F. 2d 213 (9th Cir. 1956); see *Parker* v. *Parker*, 97 P. 2d 136 (Fla. App. 1957). Once an attorney is admitted pursuant to R.R. 1:12-8, he must conduct himself in the same manner and is subject to the same regulations and laws which guide the conduct of state attorneys. He is subject to discipline by the state court for infractions in the same manner as resident attorneys. R.R. 1:26-6. See *Chafee* v. *Quidnick Co.*, 13 R. I. 442 at 450 (1881).

The manner and extent of discipline in a given case is a matter within the discretion of the appropriate state court. Each disciplinary matter must be determined on its own facts and circumstances. The ultimate objective is the protection of the public, the purification of the bar and the prevention of a recurrence. *In re Baron*, 25 N. J. 445, 136 A. 2d 873 (1957); see, *In re Herr*, 22 N. J. 276, 125 A. 2d 706 (1956); *In re Introcaso*, 26 N. J. 353, 140 A. 2d 70 (1958).

The rationale of *State* v. *Van Duyne*, 43 N. J. 369, 204 A. 2d 841 (1964), *cert. denied* 380 U. S. 987 (1965) made clear that the New Jersey supreme court was construing Canons 5 and 20 of the Canons of Professional Ethics. By rule of Court these canons are made binding upon every attorney practicing in New Jersey. R.R. 1:26-6.

The *Van Duyne* rationale was a precursor to the United States Supreme Court's landmark decision in *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966) which ruled that pervasive and prejudicial publicity deprived the defendant of a fair trial in violation of the due process clause of the fourteenth amendment. The Court came to grips with the

overall problem of prejudicial publicity and held that the trial court had the power to control such publicity; that it should have controlled the release of leads, information and gossip to the press by police officers, witnesses and counsel for both sides and that it should have exercised its powers to proscribe extra judicial statements by any lawyers, parties, witnesses or court officials which would or could divulge prejudicial matters. In setting forth guidelines for the future conduct of criminal trials, Justice Clark, writing for the majority, stated the following:

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, *such as the refusal of Sheppard to submit to interrogation or take any lie detector tests*; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; *any belief in guilt or innocence; or like statements concerning the merits of the case.* See State v. Van Duyne, 43 N. J. 369, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements." *Id.* at 384 U. S. 361, 362 (Emphasis supplied).

The New Jersey law as articulated in *Van Duyne* does not represent a provincial view of standards of legal conduct peculiar to this state. It represents, rather, a concept which is rooted not only in our Constitution but also

in those principles of legal ethics which are essential to the fair maintenance of our systems of justice.[1]

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[1] The approved draft of the American Bar Association on its "Standards Relating to Fair Trial and Free Press" provides as follows:

> "It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."

Among the prohibited public communications are the following:

> "(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;
>
> (4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;
>
> • • •
>
> (6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case."

The "Standards Relating to Fair Trial and Free Press", *supra*, calls for the following sanctions when these standards are violated:

> "It is recommended that violation of the standards set forth in section 1.1 shall be grounds for judicial and bar association reprimand or for suspension from practice and, in more serious cases, for disbarment. It is further recommended that any attorney or bar association be allowed to petition an appropriate court for the institution of disciplinary proceedings, and that the court have discretion to initiate such proceedings, either on the basis of such a petition or on its own motion."

In the matter *sub judice* the court acted to preserve and protect the integrity of the judicial process (Pb22a). Counsel, with due notice, was given an opportunity to be heard on the record as to why the disciplinary action of the court invoked by his conduct should not be applied. Despite the foregoing, Mr. Bailey now argues that

> ". . . there is no clearly defined procedure in New Jersey for taking a defense counsel out of a criminal case . . . ."

and that

> "New Jersey has provided an elaborate procedure for complaint, hearing, and review of any effort to remove counsel from practice." (Pb27).

Mr. Bailey has confused the procedure provided by the New Jersey courts under its rules for the processing of grievances filed by citizens against attorneys for improper conduct, and the right of a court to act summarily in the control of its own proceeding.

B. The Discipline of Counsel Did Not Deprive Petitioners of Constitutionally Guaranteed Rights.

During the course of its opinion the New Jersey supreme court considered the effect upon his clients that the removal of counsel would cause. The court evidenced a real concern as to whether some method might be devised which would serve both the interests of the public in preserving the integrity of the judicial process, and the desires of petitioners to be represented by F. Lee Bailey.

> "We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order." (Pb22a).

On the question of whether there was a constitutional deprivation if a client is denied the representation of counsel of his own choosing irrespective of the unethical conduct of counsel, the court concluded that no constitutional right is thereby violated (Pb23a).

Petitioners make much of the "larger issue" which they say

> ". . . was alluded to in *Cooper* v. *Hutchinson,* 184 F. 2d 119, 121-122, somewhat parenthetically, but without adjudication.
>
> • • •
>
> The court below has sought to advantage and buttress its opinion by lifting from context the 'starting' passage of the *Cooper* case, *infra.* A reading of this case *in toto* lends precious little support to the notion that the United States Court of Appeals for the Third Circuit would, had it been forced to rule upon the issue, have decided it against foreign counsel, as New Jersey seeks to surmise." (Pb29, 30).

It is evident that even now petitioners and their counsel do not understand the import of *Cooper* and its relation to *United States* v. *Bergamo,* 154 F. 2d 31 (3 Cir. 1946). This relationship was explicitly articulated by the New Jersey supreme court.

> "Defendants refer to *United States* v. *Bergamo,* 154 F. 2d 31 (3 Cir. 1946), but that case dealt with practice in the federal courts. This was made clear in *Cooper* v. *Hutchinson,* 184 F. 2d 119 (3 Cir. 1950), where the same court described as 'startling' the suggestion that the courts of the States are bound to permit out-of-state attorneys to practice before

> them (p. 122). The *Cooper* case goes no further than to say that a constitutional issue is projected if an attorney admitted *pro hac vice* is removed in midstream for no reason at all and without a chance to be heard. See *Laughlin* v. *Eicher,* 145 F. 2d 700 (D. C. Cir. 1944), *cert. denied,* 325 U. S. 866, 89 L. ed. 1985 (1945); *United States* v. *Madsen,* 148 F. Supp. 625 (D. Alaska 1957)." (Pb23a-24a)

In any event, the question of the effectiveness of counsel's assistance may be preserved by petitioners for appropriate proceedings at the termination of the criminal action pending against them.

C. The Judicial Discipline of F. Lee Bailey Was Warranted and Proper.

It is obvious that the issues raised in petitioner's brief do not in fact project a denial of rights to Harold and Dorothe Matzner, for New Jersey law has assured them the right to effective counsel. Rather, the court below has denied to Mr. Bailey the right to dictate and control the conduct of the trial. His performance throughout sought to erode principles of judicial control which preserve orderly and fair process to accused defendants. With it all Mr. Bailey asserts that New Jersey has established no

> ". . . connection between the alleged wrong to the desired right to select an uninformed jury and the extent to which that right may be advantaged by the removal of counsel." (Pb37).

Indeed, Mr. Bailey cannot or will not recognize that the real issue before the New Jersey courts was whether a trial can proceed where counsel insists that he and not the trial court will dictate procedure.

If any further proof is needed as to the appropriateness of the New Jersey supreme court's observation that Mr. Bailey has given no evidence he will stay within bounds one need search no further than the instant petition, for it is replete with irrelevant references to the testimony and record impounded by the United States District Court for the district of New Jersey. The order impounding the material recited that its use was restricted to proceedings in a New Jersey state court. This order remains in force today. This unauthorized use of the federal district court record in the instant petition reflects identical and subsequent disregard for the integrity of the judicial process. It adds weight to the New Jersey supreme court's observation that it saw little reason to hope that Mr. Bailey would behave himself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of New Jersey should be denied.

Respectfully submitted,

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